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# THE WORKS

OF

# FRANCIS BACON.

Bacon, Francis, viscount St. Alban

# THE WORKS

OF

# FRANCIS BACON,

BARON OF VERULAM, VISCOUNT ST. ALBANS, AND
LORD HIGH CHANCELLOR OF ENGLAND.

Collected and Edited

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# PROMUS

OF

# FORMULARIES AND ELEGANCIES.

# PREFACE.

ALL the editions of Bacon's works contain a small collection of Latin sentences selected from the *Mimi* of Publius Syrus, under the title of *Ornamenta Rationalia;* followed by a larger collection of English sentences selected from Bacon's own writings. These are printed as two separate pieces, with titles which seem to imply that the selection was made by Bacon himself. But this is wrong. The history of them is shortly this. Dr. Tenison found in three several lists of Bacon's unpublished papers the title *Ornamenta Rationalia.* He remembered also to have seen in the possession of Dr. Rawley's son a collection made by Bacon under that title. But no part of it was to be found among the manuscripts transmitted to him, and he retained only a general remembrance of its quality, namely that "it consisted of divers short sayings, aptly and smartly expressed, and containing in them much of good sense in a little room;" and that "it was gathered partly out of his own store and partly from the ancients."[1] Considering himself to blame however for not having preserved it, "he held himself obliged, in some sort, and as he was able, to supply the defect;" and accordingly *made* a collection

[1] Baconiana, pp. 89. 94.

on the same plan, and printed it in the *Baconiana* with the following title:

"*Ornamenta Rationalia.* A supply (by the Publisher) of certain weighty and elegant *Sentences*, some made, others collected, *by the Lord Bacon;* and by him put under the above said Title; and at present not to be found."

The "supply" consists of, 1st, "a collection of sentences out of the *Mimi of Publius;* englished by the publisher;" 2nd, "a collection of sentences out of some of the writings of the Lord Bacon."

Whatever be the value of these collections, they have clearly no right to appear among the works of Bacon, — least of all under a title which ascribes them to Bacon himself, — inasmuch as the selection was avowedly and entirely the work of Dr. Tenison. But there is a MS. in the British Museum written in Bacon's own hand, and entitled *Promus of Formularies and Elegancies*, which (though made in his early life for his own use and not intended for preservation in that shape) contains many things which might have formed part of such a collection as Tenison describes; and the place of the lost *Ornamenta Rationalia* will perhaps be most properly supplied by an account of it.

A date at the top of the first page shows that it was begun on the 5th of December 1594, — the commencement of the Christmas vacation. It consists of single sentences, set down one after the other without any marks between or any notes of reference or explanation. This collection (which fills more than forty 4to pages) is of the most miscellaneous character, and seems by various marks in the MS. to have been

afterwards digested into other collections which are lost.

The first few pages are filled chiefly, though not exclusively, with forms of expression applicable to such matters as a man might have occasion to touch in conversation, — neatly turned sentences describing personal characters or qualities, — forms of compliment, application, excuse, repartee, &c. These are apparently of his own invention, and may have been suggested by his own experience and occasions. But interspersed among them are apophthegms, proverbs, verses out of the Bible, and lines out of the Latin poets; all set down without any order or apparent connexion of subject; as if he had been trying to remember as many notable phrases as he could out of his various reading and observation, and setting them down just as they happened to present themselves.

As we advance, the collection becomes less miscellaneous; as if his memory had been ranging within a smaller circumference. In one place, for instance, we find a cluster of quotations from the Bible, following one another with a regularity which may be best explained by supposing that he had just been reading the Psalms, Proverbs, and Ecclesiastes, and then the Gospels and Epistles or (perhaps some commentary upon them), regularly through. The quotations are in Latin, and most of them agree exactly with the Vulgate, but not all; the differences however are not more than might perhaps have been expected, if he quoted from memory.

Passing this Scripture series, we come again into a collection of very miscellaneous character. Proverbs, French, Spanish, Italian, and English, — sentences out

of Erasmus's Adagia, — verses from the Epistles, Gospels, Psalms, Proverbs of Solomon, — lines from Seneca, Horace, Virgil, Ovid, — succeed each other according to some law which, in the absence of all notes or other indications to mark the connexion between the several entries, the particular application of each, or the change from one subject to another, there is no hope of discovering; though in some places several occur together, which may be perceived by those who remember the struggling fortune and uncertain prospects of the writer in those years, together with the great design which he was meditating, to be connected by a common sentiment.

Here for instance is a cluster of passages taken indiscriminately from several poets, but all pointing to the same subject; which may be described generally as notes of encouragement to those who undertake enterprises that seem too great for their powers:

Est quâdam prodire tenus, si non datur ultra.[1]
Quem si non tenuit, magnis tamen excidit ausis.[2]
Conamur tenues grandia.[3]
Tentantem majora fere præsentibus æquum.[4]
Da facilem cursum, atque audacibus annue cœptis.[5]
Neptunus ventis implevit vela secundis.[6]
Crescent illæ, crescetis amores.[7]
Et quæ nunc ratio est impetus ante fuit.[8]
Aspice venturo lætentur ut omnia sæclo.[9]

[1] Hor. Epist. I. i. 32.
[2] Ov. Met. ii. 328.
[3] Hor. Od. I. vi. 9.
[4] Hor. Epist. I. xvii. 24.
[5] Virg. Georg. I. 40.
[6] Virg. Æn. vii. 23.
[7] Virg. Ec. x. 50.
[8] Ov. Rem. Amor. 10.
[9] Virg. Ec. iv. 52.

Nor is it less easy, when we consider Bacon's position with regard to the reigning philosophy taught at the universities, to divine the connexion between the eight entries which follow:

In academiis discunt credere.

Vos adoratis quod nescitis.

So give authors their due, as you give time his due, which is to discover truth.

Vos Græci semper pueri.

Non canimus surdis: respondent omnia sylvæ.

Populus vult decipi.

Scientiam loquimur inter perfectos.

Et justificata est sapientia a filiis suis.

Presently after we find the following cluster, which seem to bear upon the same subject:

Vitæ me redde priori.[1]

I had rather know than be known.[2]

Orpheus in sylvis, inter delphinas Arion.[3]

Inopem me copia fecit.[4]

An instrument in tuning.

A youth set will never be higher.

The nine following entries, which also stand together, need no antiquarian interpreter to make their meaning intelligible:

Væ vobis jurisperiti.

[1] Hor. Epist. I. 7. 96.

[2] "Is enim ego sum qui malim scire quam nosci, discere quam docere." — *Ghetaldus's Archimedes Promotus*; quoted in Mr. Ellis's preface to *Historia Densi et Rari*.

[3] Ec. viii. 56.

[4] Ov. Met. iii. 466.

Nec me verbosas leges ediscere, nec me
Ingrato voces prostituisse foro.[1]
Fixit leges pretio atque refixit.
Nec ferrea jura
Insanumque forum et populi tabularia vidit.[2]
Miscueruntque novercæ non innoxia verba.[3]
Jurisconsulti domus, oraculum civitatis:
now as ambiguous as oracles.

Hic clamosi rabiosa fori
Jurgia vendens improbus, iras
Et verba locat.[4]

Presently we come to a series of English proverbs, all set down together, — remembrances probably or extracts out of some collection which he had been reading; and immediately after these, to a number of Latin proverbs, all taken apparently from some collection of the *Adagia* of Erasmus, in which the proverbs were arranged under heads, and the heads arranged alphabetically. For they are set down throughout in the order in which they would present themselves in such a volume, with no more exceptions than might naturally in such a case occur by accident.

[1] Ov. Amor. I. xv. 5. [2] Virg. Georg. ii. 502.

[3] This is a good instance of a mode of quotation not uncommon in Bacon, where an alteration is intentionally introduced for the sake of keeping so much as is to the purpose, and leaving out what is not so. Virgil's words (Georg. ii. 128,) are:

*Pocula si quando sævæ infecere novercæ,*
*Miscueruntque* herbas et *non innoxia verba.*

Applied to the lawyers, the word *herbas* would have had no meaning. *Novercæ* is substituted merely to complete the line.

[4] Seneca, Herc. Fur.

Having gone through this volume (for the last extract is within a few pages of the end) he returns to modern proverbs; of which there follow a great number, at first chiefly Italian, then entirely Spanish, and lastly English again.

After this he returns again to his Erasmus, commencing as before near the beginning and proceeding regularly to the end, with only two or three deviations from the alphabetical order. The difference is, that in the former collection he selected nothing but proverbs and sentences, whereas in this he selects phrases only. The series is interrupted once or twice by a note or query of his own, relating to something which had occurred to him perhaps during his walk; as for instance that "wild thyme on the ground hath a scent like a cypress chest." "Where harts cast their horns;" "Few dead birds found;" "Salt to water, whence it came;" and the like.

Next we have another collection of proverbs like the former, one or two French, several Italian, more Spanish, most English. After which he returns for the third time to Erasmus, proceeding as before, but now again selecting sentences.

Having as before come to the end of the volume, he now it seems takes up the Æneid and reads it through; for there follow sixteen or seventeen lines, or fragments of lines, all taken from the Æneid and all set down in the order in which they come in the poem; the last being the 833rd line of the 12th book. Then come several lines from Ovid; then a few from Virgil's Eclogues and Georgics; then a good many from the Satires, Epistles, and Art Poetic of Horace; then another selection from the Æneid; and lastly a good

many from Ovid's Heroides, and a few from the 1st and 2nd books of his Amores; and so the Promus concludes.

I have been thus particular in describing it, because it is chiefly interesting as an illustration of Bacon's manner of working. There is not much in it of his own. The collection is from books which were then in every scholar's hands, and the selected passages, standing as they do without any comment to show what he found in them or how he meant to apply them, have no peculiar value. That they were set down not as he read, but from memory afterwards, I infer from the fact that many of the quotations are slightly inaccurate. And because so many out of the same volume come together, and in order, I conclude that he was in the habit of sitting down from time to time, reviewing in memory the book he had last read, and jotting down those passages which for some reason or other he wished to fix in his mind. This would in all cases be a good exercise for the memory, and in some cases (as in the long list of classical *phrases* out of Erasmus, hardly any of which he ever made use of in his own writings) it may have been practised for that alone. But there is something in his selection of sentences and verses out of the poets which seems to require another explanation; for it is difficult sometimes to understand why those particular lines should have been taken and so many others apparently of equal note passed by. My conjecture is, that most of these selected expressions were connected in his mind, by some association more or less fanciful, with certain trains of thought; and stood as mottoes (so to speak) to little chapters of meditation. My meaning will be easily understood by any one who will

observe carefully the manner in which similar passages are introduced by the way, or specially commented upon, in his works. If for instance we had met in some collection like this with Homer's line,

χαίρετε κήρυκες, Διὸς ἄγγελοι ἠδὲ καὶ ἀνδρῶν,

we might well have wondered what he saw in it to make him select it for special distinction. But observe how it is introduced in the opening of the 4th book of the *De Augmentis Scientiarum*, and the value of it is explained. So again if we met in a similar collection with the twenty-four proverbs which are selected for exposition in the 8th book of the *De Augmentis*, standing by themselves without comment, we might wonder at the selection; but when we read the explanations which are there annexed, we see how much meaning in his mind they carried with them. Some further light may perhaps be thrown on this point by an observation, or the hint of an observation, which I find in a sheet of memoranda in his hand-writing (Harl. MSS. 7017. fo. 107.) which seems to have been preserved in the same bundle with the "Promus." It is a thought jotted down in evident haste, and in circumstances apparently very inconvenient for calligraphy, — with a bad pen or bad ink, or in the dark, or perhaps in a carriage, — and stands thus, *literatim*.

"Mot. of the mynd explicate in woords implicate in thowghts. I judg. best implicate in thowg. or ꝑticul. or mark. bycause of swiftnes collocat. and differe. and to make woords sequac."

By which I understand him to mean, that he found the slow and imperfect process of expounding ideas in

words to impede too much the free motions of the mind; and that he judged it a better practice to keep the pure mental conception involved in the thought, or represented by some particular image or simple mark; because by that means the mental process of comparison and distinction could be carried on more swiftly, and a habit acquired of "making words sequacious;" that is of teaching words to follow ideas, instead of making ideas wait upon words. I am not aware that he ever recorded this as his final judgment upon the point, but it may serve to explain his own practice at this time of embodying his thoughts in brief sentences, picturesque images, or memorable expressions; such as might serve to represent and recall the entire idea which remained *in puris naturalibus* in his mind.

From what I have said, it will be readily understood that this Promus, which is of considerable length, is not worth printing *in extenso*. But my account of it may be thought too incomplete without some extracts by way of specimen. For this purpose I shall select such entries as have most substantial value, independent of that Baconian comment which no editor can now supply; and I shall arrange them as well as I can under separate heads according to their character.

# EXTRACTS

FROM THE

# PROMUS OF FORMULARIES AND ELEGANCIES.

---

## I.

It is a fact worth knowing, — for it may serve as a caution and encouragement both, and it is one of those which the reverence of posterity is too apt to overlook or keep out of sight, — that the various accomplishments for which Bacon was distinguished among the men of his time, were not given to him ready-made. It may be gathered from this manuscript that the secret of his proficiency was simply that, in the smallest matters no less than in the greatest, he took a great deal of pains. Everybody prepares himself beforehand for great occasions. Bacon seems to have thought it no loss of time to prepare for small ones too, and to have those topics concerning which he was likely to have to express himself in conversation ready at hand and reduced into "forms" convenient for use. Even if no occasion should occur for using them, the practice would still serve for an exercise in the art of expression.

Here for instance are some forms for describing personal characters or qualities:

1. No wise speech, though easy and voluble.
2. Notwithstanding his dialogues (of one that giveth life to his speech by way of question).
3. He can tell a tale well (of those courtly gifts of speech which are better in describing than in considering).
4. A good comediante (of one that hath good grace in his speech).
5. Cunning in the humours of persons, but not in the conditions of actions.
6. He had rather have his will than his wish.
7. A brain cut with fascets.
8. More ingenious than natural.
9. He keeps his ground: — of one that speaketh certainly and pertinently.
10. He lighteth well; — of one that concludeth his speech well.
11. Of speeches digressive: This goeth not to the end of the matter: — from the lawyers.[1]
12. *Per otium:* — to anything impertinent.
13. Speech that hangeth not together nor is concludent: Raw silk; sand.
14. Speech of good and various weight but not nearly applied: — A great vessel that cannot come near land.
15. Of one that rippeth things up deeply: He shooteth too high a compass to shoot near.
16. Ingenuous honesty and yet with opposition and strength.

[1] The last three forms are not from the Promus, but from a separate sheet of similar character, fo. 107. The next four are from another, fo. 109.

Here again is a set of phrases adapted to occasions of compliment, of excuse, of application, of acknowledgment, of introduction, of conclusion, &c., belonging to the same class with the *formulæ minores orationis*, of which he explains the nature and use in the 4th book of the *De Augmentis* under the head of Rhetoric:

1. The matter though it be new, (if that be new which hath been practised in like case, though not in this particular).
2. I leave the reasons to the party's relation and the consideration of them to your wisdom.
3. Wishing you all, &c., and myself occasion to do you service.
4. I shall be glad to understand your news, but none rather than some overture wherein I may do you service.
5. Ceremonies and green rushes are for strangers.
6. Small matters need solicitation; great are remembered of themselves.
7. The matter goeth so slowly forward that I have almost forgot it myself, so as I marvel not if my friends forget.
8. I shall be content my course intended for service leave me in liberty.
9. It is in vain to forbear to renew that grief by speech, which the want of so great a comfort must needs renew.
10. As I did not seek to win your thanks, so your courteous acceptation deserveth mine.
11. I desire no secret news, but the truth of common news.

12. The difference is not between you and me, but between your profit and my trust.
13. Why hath not God sent you my mind or me your means?
14. I think it my double good hap, both for the obtaining and for the mean.
15. I wish one as fit as I am unfit.

A separate sheet in the same bundle is filled with forms of morning and evening salutation.

The following may be all classed under the head of *repartees*, and were probably suggested by his experience in the courts of law:

1. Now you say somewhat. — Even when you will; now you begin to conceive, I begin to say.
2. Repeat your reason. — Bis ac ter pulchra.
3. You go from the matter. — But it was to follow you.
4. Come to the point. — Why I shall not find you there.
5. Let me make an end of my tale. — That which I will say will make an end of it.
6. You take more than is granted. — You grant less than is proved.
7. It is so, I will warrant you. — You may warrant me, but I think I shall not vouch you.
8. Answer me shortly. — Yea, that you may comment upon it.
9. The cases will come together. — It will be to fight then.

There are more of these; but these will serve for specimens.

## II.

In wise sentences and maxims of all kinds the collection, as might be expected, is rich. But very many of them are now hacknied, and many others are seen to greater advantage in different parts of Bacon's works, where they are accompanied with his comments or shewn in their application. The general character of them will be sufficiently understood from the following samples, which are taken almost at random:

1. Suavissima vita indies meliorem fieri:
2. Stay a little, that we may make an end the sooner.
3. L' astrologia è vera, ma l' astrologico non vi truova.
4. If the bone be not true set, it will never be well till it be broken.
5. All is not in years, somewhat is in hours well spent.
6. Detractor portat diabolum in linguâ.
7. Velle suum cuique est, nec voto vivitur uno.
8. Black will take no other hue.
9. Qui in parvis non distinguit in magnis labitur.
10. Everything is subtle till it be conceived.
11. That which is forced is not forcible.
12. Quod longe jactum est leviter ferit.
13. Nec nihil neque omnia sunt quæ dicuntur.
14. Super mirari cœperunt philosophari.
15. Prudens celat scientiam, stultus proclamat stultitiam.
16. Non recipit stultus verba prudentiæ nisi ea dixeris quæ sunt in corde ejus.[1]

[1] A sentence frequently quoted by Bacon. It is the Vulgate version of Proverbs xviii. 2., which is rendered differently in the English translation,

17. Melior claudus in via quam cursor extra viam.
18. The glory of God is to conceal a thing, and the glory of a man is to find out a thing.
19. Facile est ut quis Augustinum vincat, viderit utrum veritate an clamore.
20. Hinc errores multiplices, quod de partibus vitæ singuli deliberant, de summa nemo.
21. Optimi consiliarii mortui.
22. Odere reges dicta quæ dici jubent.
23. I contemn few men, but most things.
24. Variam dant otia mentem.
25. Non possumus aliquid contra veritatem sed pro veritate.
26. Qui bene nugatur ad mensam sæpe vocatur.
27. A man's customs are the moulds where his fortune is cast.
28. He that resolves in haste repents at leisure.
29. You would be over the stile before you come at it.
30. I never liked proceeding upon articles before books, nor betrothings before marriages.
31. Nothing is impossible to a willing heart.
32. Better be envied than pitied.
33. Better sit still than rise and fall.
34. Always let losers have their words.
35. He goes far that never turneth.
36. Suum cuique pulchrum.
37. Quæ supra nos nihil ad nos.
38. In magnis et voluisse sat est.

viz.: "A fool hath no delight in understanding *but that his heart may discover itself;*" the meaning of which I do not understand.

39. Et post malam segetem serendum est.
40. Bonæ leges ex malis moribus.
41. Nil tam bonum est quin male narrando possit depravarier.
42. Totum est majus sua parte (against factions and private profit).
43. Turpe proco ancillam sollicitare, est autem virtutis ancilla laus.

## III.

Of the sentences taken from the Bible and from the *Adagia* of Erasmus, I need not give any specimens; for I can throw no light on the principle which guided Bacon in selecting them, and if I were to attempt to make another selection from his I should only be adding a few more sentences of the same kind as those just given; several of which do in fact come from Erasmus and some from the Bible.

## IV.

The proverbs may all or nearly all be found in our common collections; and the best of them are of course in everybody's mouth. The following, which are among the least familiar to modern ears, may serve for a sample.

1. De nouveau tout est beau.
   De saison tout est bon.
2. A long winter maketh a full ear.
3. While the leg warmeth the boot harmeth.
4. Be the day never so long
   At last it ringeth to evensong.
5. Seldom cometh the better.

6. He that will sell lawn before he can fold it
   Shall repent him before he have sold it.
7. A beck is as good as a Dieu vous garde.
8. When bale is heckst boot is next.
9. He that never clomb never fell.
10. Itch and ease can no man please.
11. All this wind shakes no corn.
12. Timely crooks the tree
    That will a good camock be.
13. Better is the last smile than the first laughter.
14. The cat knows whose lips she licks.
15. As good never a whit as never the better.
16. The packs may be set right by the way.
17. It is the cat's nature and the wench's fault.
18. Good watch chooseth ill adventure.
19. Early rising hasteneth not the morning.
20. Let them that be a-cold blow at the coal.
21. I have seen as far come as nigh.
22. Tell your cards and tell me what you have won.
23. When thrift is in the field he is in the town.
24. That he wins in the hundred he loses in the shire.
25. To do more than the priest spake of on Sunday.
26. Use maketh mastery.
27. Love me little, love me long.
28. Time trieth troth.
29. Make not two sorrows of one.
30. There is no good accord
    Where every one would be a lord.
31. That the eye seeth not, the heart rueth not.

32. Ill putting a sword in a madman's hand.

33. Quien nesciamente pecca nesciamente va al Inferni.

## V.

I cannot find anything in the lines selected from Virgil, Horace, or Ovid, that should make it worth while to print them here. Those from Virgil may have been used with excellent effect for rhetorical purposes, but it would depend upon the occasion and manner in which they were introduced. Most of those from Horace are so full of sense in the observation and felicity in the expression that they would be well worth printing as they stand, only that everybody knows them. And the same remark applies, though in a less degree, to those from Ovid: for Ovid was a fine observer and a great master of neat and pointed expression. His *Ars amandi* sparkles with observations and precepts which the best didactic writers on the worthiest subjects have scarcely surpassed. The following extracts, nicely picked out of that most unworthy poem, stand together in the Promus; and contain the seeds of half a treatise on the art of persuasion, whether in speech or writing:

Sed lateant vires, nec sis in fronte disertus.
Sit tibi credibilis sermo consuetaque lingua
. . . . præsens ut videare loqui.[1]
Ille referre aliter sæpe solebat idem.
Nec vultu destrue verba tuo.

[1] The omission of the words "Blanda tamen," which complete the line in the original, indicates the principle of selection. From the precepts given by Ovid for the particular art of Love, or rather of Love-making, Bacon takes so much only as relates to *art* in general.

Nec sua vesanus scripta poeta legat.
Ars casum simulet.
Quid cum legitimâ fraudatur litera voce,
Blæsaque fit jusso lingua coacta sono?

And these will probably be thought enough by way of specimen.

## VI.

There is one other class of memoranda in this Promus which I have not yet mentioned, and they are the more notable because they have been transferred with additions and a formal title to a separate sheet (fo. 126.), as if he had intended to proceed with the collection. This fragment I have thought worth printing *in extenso;* not only as a curious illustration of the attention which Bacon bestowed upon the details and smaller graces of his art, but also because it may possibly throw some light on the history of the English language. It is headed *Analogia Cæsaris* (a title by the way, of which, comparing it with the supposed character of Cæsar's lost book *de Analogia*, as explained in the *De Augmentis*, lib. vi. c. 1. I do not see the fitness) and docqueted by Bacon himself *Verba interjectiva; sive ad grā sparsā.* It is fairly written in Bacon's own hand, in three parallel columns. But this I think was only to save paper; for the articles which happen to lie over against each other do not appear to be connected in any way; and therefore I have not thought it necessary to preserve that form in the printing. In other respects I have copied it literatim. Those who are curious as to the periods when particular forms of expression came into use or wore out, may perhaps derive

some useful hints from it. But to enter into any speculations of that kind here would be to go beyond my province as editor.

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## ANALOGIA CÆSARIS.

VERB. ET CLAUSULÆ AD EXERCITATIONEM ACCENTUS ET AD GRATIAM SPARSAM ET AD SUITATEM.

Say that; (for admitt that)

Peraventure can yow; S͡p. (what can you).

So much there is. f͡r. (neverthelesse).

See then how. S͡p. (much lesse).

Yf yow be at leasure | furnyshed &c. as phappes yow are (instead of are not).

For the rest (a transition concluding).

The rather bycause (contynuing another's speach).

To the end, saving that, whereas, yet, (contynuances, and so of all kynds.

In contemplation (in consideration).

Not prejudicing.

With this (cum hoc quod verificare vult).

Without that (absq. hoc quod

For this tyme (when a man extends his hope or imaginacon or beleefe to farre.

A mery world when such fellowes must correct × A mery world when the simplest may correct.

It is like S^r &c. (putting a man agayne into his tale interrupted.

Your reason.

I have been allwaies at his request.
His knowledg lieth about him.
Such thoughts I would exile into my dreames.
A good crosse poynt but the woorst cinq a pase.
He will never doe his tricks clean.
A proper young man and so will he be while he lives.
2. of these fowre take them where yow will.
I have knowne the tyme and it was not half an howre ago.
Pyonner in the myne of truth.
As please the painter.
A nosce teipsū (a chiding or disgrace.
Valew me not the lesse bycause I am yours.
Is it a small thing y$^{t}$ &c. (cannot yow not be content, an hebraisme.
What els? Nóthing lesse.
It is not the first untruth I have heard reported nor it is not the first truth I have heard denied.
I will proove × why goe and proove it.
Minerall wytts strong poyson yf they be not corrected.
O the '
O my L. S$^{r}$
Beleeve it.
Beleeve it not.
for a tyme.
Mought it please God that. fr. (I would to God.
Never may it please yow.
As good as the best.
I would not but yow had doone it × But shall I doe it againe.

The sonne of somew[t]. S͡p.
To freme (to sigh (?) S͡p.
To cherish or endear.
To undeceive. S͡p. To disabuse[1]
deliver and unwrapped.
To discount (to cleere.
Brazed (impudent.
Brawned seared unpayned.
Vice light (Twylight.
banding (factions.
Remooving (remuant).
A third person (a broker.
A nose cut of; tucked up.
His disease hath certen traces.
To plaine him on (?).
Ameled (fayned, counterfett in the best kynd.
Having the upper grownd (awcthority.
His resorts (his conceyts.
It may be well last for it hath lasted well.
Those are great with yow that are great by yow.
The avenues.
A back-thought.
Baragan (perpetuo juvenis).
A Bonance (a caulme.
To drench, to potion (to infect.
Haggard in sauvages.
Infistuled (made hollow with malign dealing.
The ayre of his behavio[r]; fashons.

[1] An interlineation, written under S͡p.

## VII.

There are two other papers in the same bundle which are worth printing, because they help to show the sort of use Bacon made of these rough collections. One of them (fo. 114.) is dated 27th January 1595 (that is 1595–6), about fourteen months after the commencement of the Promus, but appears to have been revised and corrected at a later period. It seems to be a rudiment or fragment of one of those collections by way of "provision or preparatory store for the furniture of speech and readiness of invention" which he recommends in the *Advancement of Learning*, and more at large in the *De Augmentis* (lib. vi. c. 3.) under the head of Rhetoric; and which, he says, "appeareth to be of two sorts; the one in resemblance to a shop of pieces unmade up, the other to a shop of things ready made up, both to be applied to that which is frequent and most in request: the former of these I will call *antitheta* and the latter *formulæ*.

"*Antitheta* are theses argued *pro et contra*, wherein men may be more large and laborious; but in such as are able to do it, to avoid prolixity of entry, I wish the seeds of the several arguments to be cast up into some brief and acute sentences, not to be cited, but to be as skeins or bottoms of thread, to be unwinded at large when they come to be used; supplying authorities and examples by reference. . . . . .

"*Formulæ* are but decent and apt passages and conveyances of speech, which may serve indifferently for differing subjects; as of preface, conclusion, digression, transition, excusation, &c. For as in buildings there is great pleasure and use in the well-casting of

the stair-cases, entries, doors, windows, and the like: so in speech, the conveyances and passages are of special ornament and effect."[1]

Of these *antitheta*, a considerable collection is given in the *De Augmentis* by way of example. The *Analogia Cæsaris* contains several examples of these *formulæ*. The paper before us seems to belong rather to the former class. The sentences appear to have been written in the first instance consecutively, without any note of the subjects to which they are to be referred. The titles have been added afterwards in the margin. I distinguish them here by Italics.

## Formularies, Promus. 27 Jan. 1595.

*Against conceyt of difficulty or impossibility.*

Tentantes ad Trojam pervenere Graii.

Atque omnia pertentare.

*Abstinence and negatives.*

Qui in agone contendit a multis abstinet.

All the coñaundm$^{ts}$. negative save two.

*Curious, busy without judgm$^{t}$, good direction.*

Parerga; moventes sed nil promoventes, operosities, nil ad suñam.

Claudus in via.

To give the grownd in bowling.

Like tempring with phisike, a good diett much better.

[1] Advancement of Learning, Book 2.

*Zeal, affectiō, alacrity.*

Omnia possū in eo qui me confortat.
Possunt quia posse videnť.
Exposition of not overweening but overwilling.
Goddes presse; voluntaries.

*Detraction.*

Chester's wytt to deprave, and otherwise not wyse.

*Hast, impatience.*

In actions as in wayes the neerest y^ fowlest.

On the back of the sheet is written "fragments of Elegancyes."

The other paper (fo. 108.) bears no date. It is a commencement of a collection of *antitheta*, the *pro* and *contra* being set down in opposite columns, under their proper heads. It is very fairly written in Bacon's own hand, and large blank spaces are left between the several heads, as if for further insertions; yet it seems to have been entirely rejected afterwards, for though some of the questions are handled in the collection of *antitheta* given in the *De Augmentis*, none of these sentences are introduced there, or not in the same relation.

*Upon Impatience of Audience.*

Verbera sed audi.
Auribus mederi difficillimum.
Noluit intelligere ut bene ageret.
The fable of the Syrenes.
Placidasque viri deus obstruit aures.

The ey is the gate of the affection, but the ear of the understanding.

*Upon quæstiō to reward evill w^th^ evill.*

Noli æmulari in malignantibus.
Crowne him with coles.
Nil malo quā illos similes esse sui et me mei.
Cum perverso perverteris.
Lex talionis.
Yow are not for this world.
Tanto buon che val niente.

*Upon quæstiō whether a mā should speak or forbear speach.*

Quia tacui inveteraverunt ossa mea. (Speach may now and then breed smart in the flesh; but keeping it in goeth to the bone.)
Credidi propter quod locutus sum.
Obmutui et humiliatus sum.
Silui etiam a bonis et dolor meus renovatus est.
Obmutui et nō aperui os meum quoniā tu fecisti.
It is goddes doing.
Posui custodiam ori meo cū consisteret peccator adversum me.
Ego autem tanquam surdus non audiebam et tanq^m^ mutus non aperiens os suum.

*Benedictions and Maledictions.*

Et folium ejus nō defluet.
Mella fluant illi, ferat et rubus asper amomū.

*Abominacon.*

Dii meliora piis.
Horresco referens.

## VIII.

One or two other papers belonging to this bundle I may have occasion to quote hereafter, in connexion with the subjects to which they refer. But there is one which stands by itself, and though not belonging exactly to the class of "Formularies," is curious enough to be worth preserving, and may be allowed in default of a fitter place to come in here.

I suppose no man was less given to play than Bacon. But the following sheet of notes (written hastily and carelessly in his own Roman hand) shows that on some occasion or other he had thought a good deal about it. In the catalogue of particular histories, which were to combine into the great Natural and Experimental History that was to serve for the foundation of Philosophy, the 123rd title is *Historia Ludorum omnis generis.*[1] And it may be that he once thought of drawing up directions for the execution of it, or possibly even of doing a portion by way of specimen; as his manner was. Here at any rate is the plan of an elaborate treatise on the subject.

### Play.[2]

The syn against the holy ghost — termed in zeal by one of the fathers.

Cause of oths, quarells, expence and unthriftines: ydlenes and indispositiō of the mynd to labors.

Art of forgetting; cause of society, acquaintance, familiarity in frends; neere and ready attendance in servants; recreatiō and putting of melancholy.

[1] Catalogus Historiarum particularium, secundum capita.

[2] Harl. MSS. 7017. f. 110. The writing goes down to the very bottom of the first page.

Putting of malas curas et cupiditates.

Games of activity and passetyme; of act. of strength, quicknes; quick of ey, hand, legg, the whole mocō: strength of arme; legge; of activity, of sleight.

Of passetyme onely; of hazard; of play mixt.

Of hazard; meere hazard; cunnyng in making y^e^ game: Of playe; exercise of attentiō: of memory: of dissimulation: of discrecō.

Of many hands or of receyt: of few: of quick returne, tedious; of præsent judgm^t^, of uncerten yssue.

Severall playes or ideas of play.

Frank play, wary play; venturous, not venturous; quick, slowe.

Oversight: Dotage: Betts: Lookers on: Judgm^t^.

Groome porter: Christmas: Inventiō for hunger (?).

Oddes: stake: sett.

He that folowes his losses and giveth soone over at wynnings will never gayne by play.

Ludimus incauti studioque aperimur ab ipso.

He that playeth not the begynnyng of a game well at tick tack and the later end at yrish shall never wynne.

Frier Gilbert.

Y^e^ lott; earnest in old tyme sport now, as musike out of Church to chamb^r^.

# RELIGIOUS WRITINGS.

# PREFACE

TO

# A CONFESSION OF FAITH.

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Bacon's religious creed might, if we were left without special information concerning it, be gathered with tolerable accuracy from his general works. For though the passages which relate especially to matters theological are few and short, his theory of the relation between the Creator and the Creatures, the Word and the Works, is incorporated with all his views, and forms an essential part of his theory of the world. Nor is it merely that the moral and sentimental element of religion is strong in him, — trust, love, reverence, submission; sense of the presence of an inspiring, governing, protecting, judging God, whose will is law, and in the pleasing and displeasing of whom right and wrong, good and evil, have (for man) their being, — together with recognition of the life of Christ on earth as the highest exposition and interpretation of that will; but the entire scheme of Christian theology, — creation, temptation, fall, mediation, election, reprobation, redemption, — is constantly in his thoughts; underlies everything; defines for him the limits of the

province of human speculation; and as often as the course of enquiry touches at any point the boundary-line, never fails to present itself. Nor is it by any means a formal creed reserved for solemn occasions and forbidden to mix with week-day thoughts and businesses; but being accepted without any reserve or misgiving as the ultimate explanation of everything, there is hardly any occasion or any kind of argument into which it does not at one time or another incidentally introduce itself. Fortunately however it is not from such incidental allusions that we are left to gather his creed. We have it here set forth by himself distinctly and completely in all its parts: an articulate Confession of Faith; not transcribed from the catechism, but digested and reproduced in a form of his own; in which the several parts of the scheme are exhibited in logical coherency, and presented in a light as satisfactory perhaps to the understanding as the case admits, — a case in which that which is to be comprehended is infinite, and that which is to comprehend, finite.[1]

This Confession was first printed in the *Remains* (1648) with a title stating that it was written by Bacon "about the time he was solicitor general;" afterwards in the *Resuscitatio* by Rawley, who merely says that he composed it many years before his death. But in the manuscript from which the text is here taken

[1] "Les idées Chrétiennes y sont traduites" (says M. Charles de Rémusat, than whom no man has studied Bacon with a more sincere desire to understand him,) "sous une forme aussi rationelle qu'il est possible de le faire sans les alterer. Rien n'est outré, rien n'est attenué. Le mystère y est rendu intelligible jusqu'au point où il cesserait d'être un mystère. . . . Ce n'est pas une adhésion verbale à un pur formulaire, mais la déduction d'une croyance réfléchie, et, suivant nous, un monument des plus propres à frapper les esprits les moins dociles à toute inspiration Chrétienne." — *Bacon: sa Vie, son Influence, et sa Philosophie*, p. 152.

(Harleian MSS. 1893. fo. 1.), — a copy in the hand of one of Bacon's own servants, and the oldest I have met with, — it is headed "a Confession of Faith by *M^r* Bacon;"[1] from which we may certainly conclude that it was written before he was knighted; that is before the summer of 1603; how long before, I know of no data for determining.

To criticise the theology of it would be beyond my province. But if any one wishes to read a *summa theologiæ* digested into ten pages of the finest English of the days when its tones were finest, he may read it here.

[1] There are three other MSS. in the British Museum: one (Addit. 4263. fo. 111.) which seems to have belonged to Dr. Rawley, and is partly in his hand, headed *A Confession of the Faith, by Fr. Bacon;* and two others (Harl. 6828. fo. 1., and Addit. 211. fo. 82.), transcripts by hands comparatively modern, which are headed respectively *S^r Fran. Bacon, his Confession of his faith:* and, *A Confession of the faith, written by Francis Lord Viscount S^t. Albans at* (sic) *or before he was Solicitor Generall.* The older MS. which I have followed has apparently been the original of all three. In almost every case where the *Resuscitatio* varies from it, — and certainly in every case which is at all material, — all the other MSS. agree with it.

# CONFESSION OF FAITH.

# A CONFESSION OF FAITH,[1]

BY

## Mr. BACON.

---

I BELIEVE that nothing is without beginning but God; no nature, no matter, no spirit, but one only and the same God. That God as he is eternally almighty, only wise, only good, in his nature, so he is eternally Father, Son, and Spirit, in persons.

I believe that God is so holy, pure, and jealous, as it is impossible for him to be pleased in any creature, though[2] the work of his own hands; So that neither Angel, Man, nor World, could stand, or can stand, one moment in his eyes, without beholding the same in the face of a Mediator; And therefore that before him with whom all things are present, the Lamb of God was slain before all worlds; without which eternal counsel of his, it was impossible for him to have descended to any work of creation; but he[3] should have enjoyed the blessed and individual society of three persons in Godhead only for ever.

[1] A Confession of the Faith, written by the Right Honourable Francis Bacon, Baron of Verulam, &c. R.

[2] So R. The old MS. has "through."

[3] So R. The MSS. omit "he."

But that out of his eternal and infinite goodness and love purposing to become a Creator, and to communicate with[1] his creatures, he ordained in his eternal counsel, that one person of the Godhead should in time[2] be united to one nature and to one particular of his creatures: that so in the person of the Mediator the true ladder might be fixed, whereby God might descend to his creatures, and his creatures might ascend to God: so that God, by the reconcilement of the Mediator, turning his countenance towards his creatures, (though not in the same light[3] and degree,) made way unto the dispensation of his most holy and secret will; whereby some of his creatures might stand and keep their state, others might possibly fall and be restored, and others might fall, and not be restored in their state,[4] but yet remain in being, though under wrath and corruption: all in the virtue of[5] the Mediator; which is the great mystery and perfite[6] centre of all God's ways with his creatures, and unto which all his other works and wonders do but serve and refer.

That he chose (according to his good pleasure) Man to be that creature, to whose nature the person of the eternal Son of God should be united; and amongst the generations of men, elected a small flock, in whom (by the participation of himself) he purposed to express the riches of his glory; all the ministration of angels, damnation of devils and reprobate,[7] and universal administration of all creatures, and dispensation of all

[1] to. R.
[2] R. omits "in time."
[3] though not in equal light. R. The MS. 6828. has "though not in the same height;" which is perhaps right. In 4263. the word is illegible from damp.
[4] estate. R.
[5] with respect to. R.
[6] perfect. R.
[7] reprobates. R.

times, having no other end, but as the ways and ambages of God to be further glorified in his Saints, who are one with the Mediator,[1] who is one with God.

That by the virtue of this his eternal counsel touching a Mediator,[2] he descended at his own good pleasure,[3] and according to the times and seasons to himself known, to become a Creator; and by his eternal Word created all things, and by his eternal Spirit doth comfort and preserve them.

That he made all things in their first estate good, and removed from himself the beginning of all evil and vanity into the liberty of the creature; but reserved in himself the beginning of all restitution to the liberty of his grace; using nevertheless and turning the falling and defection of the creature, (which to his prescience was eternally known) to make way to his eternal counsel touching a Mediator, and the work he purposed to accomplish in him.

That God created Spirits, whereof some kept their standing, and others fell. He created heaven and earth, and all their armies and generations, and gave unto them constant and everlasting laws, which we call *Nature*, which is nothing but the laws of the creation; which laws nevertheless have had three changes or times, and are to have a fourth and last.[4] The first, when the matter of heaven and earth was created without forms: the second, the *interim* of every day's work:[5] the third, by the curse, which notwithstanding

[1] their head the Mediator. R.
[2] R. omits the words "touching a Mediator."
[3] condescended of his own good pleasure. R.
[4] or last. R.
[5] the interim of the perfection of every day's work. R.

was no new creation, but a privation of part of the virtue of the first creation:[1] and the last, at the end of the world, the manner whereof is not yet revealed.[2] So as the laws of Nature, which now remain and govern inviolably till the end of the world, began to be in force when God first rested from his works and ceased to create; but received a revocation in part by the curse, since which time they change not.

That notwithstanding God hath rested and ceased from creating since the first Sabbath,[3] yet nevertheless he doth accomplish and fulfil his divine will in all things great and small, singular and general, as fully and exactly by providence, as he could by miracle and new creation, though his working be not immediate and direct, but by compass; not violating Nature, which is his own law upon the creature.

That at the first the soul of Man was not produced by heaven or earth, but was breathed immediately from God; so that the ways and proceedings of God with spirits are not included in Nature, that is, in the laws of heaven and earth; but are reserved to the law of his secret will and grace: wherein God worketh still, and resteth not from the work of redemption, as he resteth from the work of creation: but continueth working till the end of the world; what time that work also shall be accomplished, and an eternal sabbath shall ensue. Likewise that whensoever God doth break[4] the law of Nature by miracles, (which are ever[5] new creations,) he never cometh to that point or

[1] This last clause ("but a privation," &c.,) is omitted in R.

[2] fully revealed. R.

[3] "Sabaoth" in MS.: a mistake, but probably a mistake of Bacon's own. See "Advancement of Learning," Book 2.

[4] transcend. R.

[5] may ever seem as. R.

pass, but in regard of the work of redemption, which is the greater, and whereto all God's signs and miracles do refer.

That God created Man in his own image, in a reasonable soul, in innocency, in free-will, and in sovereignty: That he gave him a law and commandment, which was in his power to keep, but he kept it not: That man made a total defection from God, presuming to imagine that the commandments and prohibitions of God were not the rules of Good and Evil, but that Good and Evil had their own principles and beginnings; and lusted after the knowledge of those imagined beginnings, to the end to depend no more upon God's will revealed, but upon himself and his own light, as a God; than the which there could not be a sin more opposite to the whole law of God: That yet nevertheless this great sin was not originally moved by the malice of man, but was insinuated by the suggestion and instigation of the devil, who was the first defected creature, and fell of malice and not by temptation.

That upon the fall of Man, death and vanity entered by the justice of God, and the image of God in man was defaced, and heaven and earth which were made for man's use were subdued to corruption by his fall; but then that instantly and without intermission of time, after the word of God's law became through the fall of man frustrate as to obedience, there succeeded the greater word of the promise, that the righteousness of God might be wrought by faith.

That as well the law of God as the word of his promise endure the same for ever: but that they have been revealed in several manners, according to the dis-

pensation of times. For the law was first imprinted in that remnant of light of nature, which was left after the fall, being sufficient to accuse: then it was more manifestly expressed in the written law; and was yet more opened by the prophets; and lastly expounded in the true perfection by the Son of God, the great prophet and perfect interpreter of the law.[1] That likewise the word of the promise was manifested and revealed, first by immediate revelation and inspiration; after by figures, which were of two natures: the one, the rites and ceremonies of the law; the other, the continual history of the old world, and Church of the Jews, which though it be literally true, yet is it pregnant of a perpetual allegory and shadow of the work of the Redemption to follow. The same promise or evangile was more clearly revealed and declared by the prophets, and then by the Son himself, and lastly by the Holy Ghost, which illuminateth the Church to the end of the world.

That in the fulness of time, according to the promise and oath of God,[2] of a chosen linage descended the blessed seed of the woman, Jesus Christ, the only begotten Son of God and Saviour of the world; who was conceived by the power and overshadowing of the Holy Ghost, and took flesh of the Virgin Mary: that the Word did not only take flesh, or was joined to flesh, but was made flesh, though without confusion of substance or nature: so as the eternal Son of God and the ever blessed Son of Mary was one person; so one, as the blessed Virgin may be truly and catholicly called *Deipara*, the Mother of God; so one, as there is no

[1] perfect interpreter, as also fulfiller, of the law. R.
[2] R. omits "of God."

unity in universal nature, not that of the soul and body of man, so perfect; for the three heavenly unities (whereof that is the second) exceed all natural unities: that is to say, the unity of the three persons in Godhead; the unity of God and Man in Christ; and the unity of Christ and the Church: the Holy Ghost being the worker of both these latter unities; for by the Holy Ghost was Christ incarnate and quickened in flesh, and by the Holy Ghost is man regenerate and quickened in spirit.

That Jesus the Lord became in the flesh a sacrificer and sacrifice for sin: a satisfaction and price to the justice of God; a meriter of glory and the kingdom; a pattern of all righteousness; a preacher of the word which himself was; a finisher of the ceremony; a corner-stone to remove the separation between Jew and Gentile; an intercessor for the Church; a Lord of Nature in his miracles; a conqueror of death and the power of darkness in his resurrection; and that he fulfilled the whole counsel of God, performed his whole sacred offices [1] and anointing on earth, accomplished the whole work of the redemption and restitution of man to a state superior to the Angels, whereas the state of his creation [2] was inferior; and reconciled or [3] established all things according to the eternal will of the Father.

That in time, Jesus the Lord was born in the days of Herod, and suffered under the government of Pontius Pilate, being deputy of the Romans, and under the high priesthood of Caiaphas, and was betrayed by Judas, one of the twelve apostles, and was crucified at

[1] all his sacred offices. R. MS. 4263. has "his holy sacred office."
[2] of man by creation. R.
[3] and. R.

Jerusalem,[1] and after a true and natural death, and his body laid in the sepulchre, the third day he raised himself from the bonds of death, and arose and shewed himself to many chosen witnesses, by the space of divers days; and at the end of those days, in the sight of many, ascended into heaven; where he continueth his intercession; and shall from thence at the day appointed come in greatest glory to judge the world.

That the sufferings and merits of Christ, as they are sufficient to do away the sins of the whole world, so they are only effectual to those that[2] are regenerate by the Holy Ghost; who breatheth where he will of free grace; which grace, as a seed incorruptible, quickeneth the spirit of man, and conceiveth him anew the son of God and the member[3] of Christ: so that Christ having man's flesh, and man having Christ's spirit, there is an open passage and mutual imputation; whereby sin and wrath is[4] conveyed to Christ from man, and merit and life is conveyed to man from Christ: which seed of the Holy Ghost first figureth in us the image of Christ slain or crucified, in[5] a lively faith; and then reneweth in us the image of God in holiness and charity; though both imperfectly, and in degrees far differing even in God's elect, as well in regard of the fire of the Spirit, as of the illumination,[6] which is more or less in a large proportion: as namely, in the Church before Christ; which yet nevertheless was partaker of one and the same salvation[7] and one[8] and the same means of salvation with us.

[1] Hierusalem. R.
[2] which. R.
[3] a son of God and member. R.
[4] was. R.
[5] through. R.
[6] illumination thereof. R.
[7] salvation with us. R.
[8] and of one. R.

That the work of the Spirit, though it be not tied to any means in heaven or earth, yet it is ordinarily dispensed by the preaching of the word, the administration of the sacraments, the covenant[1] of the fathers upon the children, prayer, reading, the censures of the Church, the society of the godly, the cross and afflictions, God's benefits, his judgments upon others, miracles, the contemplation of his creatures, all which (though some be more principal) God useth as the means of vocation and conversion of his elect; not derogating from his power to call immediately by his grace, and at all hours and moments of the day (that is, of man's life), according to his good pleasure.

That the word of God, whereby his will is revealed, continued in revelation and tradition until Moses; and that the Scriptures were from Moses' times[2] to the times of the Apostles and Evangelists; in whose age, after the coming of the Holy Ghost, the teacher of all truth, the book of the Scriptures is shut and closed, as[3] to receive any new addition; and that the Church hath no power over the Scriptures to teach or command anything contrary to the written word, but is as the Ark, wherein the tables of the first testament were kept and preserved: that is to say, the Church hath only the custody and delivery over of the Scriptures committed unto the same; together with the interpretation of them.[4]

That there is an universal or catholic Church of

[1] covenants. R.

[2] time. R. I suspect that a clause has been lost here, stating *what* the Scriptures were. But there is no indication of it in any of the MSS.

[3] was shut and closed so as not. R. Probably a conjectural correction; but not wanted. "as to receive" means "with regard to the receiving."

[4] but such only as is conceived from themselves. R.

God, dispersed over the face of the earth; which is Christ's spouse, and Christ's body; being gathered of the fathers of the old world, of the Church of the Jews, of the spirits of the faithful dissolved, of[1] the spirits of the faithful militant, and of the names yet to be born, which are already written in the book of life. That there is also a visible Church, distinguished by the outward works of God's covenant, and the receiving of the holy doctrine, with the use of the mysteries of God, and the invocation and sanctification of his holy name. That there is also a holy succession in the prophets of the new testament and fathers of the Church, from the time of the apostles and disciples which saw our Saviour in the flesh, unto the consummation of the work of the ministry; which persons are called from God by gift, or inward anointing, and the vocation of God followed by an outward calling and ordination of the Church.

I believe that the souls of those that die in the Lord are blessed, and rest from their labours, and enjoy the sight of God, yet so as they are in expectation of a further revelation of their glory in the last day; at which time all flesh of man shall arise and be changed, and shall appear and receive from Jesus Christ his eternal judgment; and the glory of the saints shall then be full, and the kingdom shall be given up to God the Father, from which time all things shall continue for ever in that being and state which they shall receive;[2] so as there are three times (if times they may be called) or parts of eternity: The first, the time before beginnings, when the Godhead was only, without the

[1] and. R.

[2] which then they shall receive. R.

being of any creature: The second, the time of the mystery, which continueth from the time of creation [1] to the dissolution of the world: And the third, the time of the revelation of the sons of God; which time is the last, and is everlasting without change.

[1] from the creation. R.

# MEDITATIONES SACRÆ.

# PREFACE.

THE *Meditationes Sacræ* were written by Bacon in Latin, and published in 1597 in the same volume with the *Essays* and the *Colours of Good and Evil.* This volume was reprinted the next year by the same publisher (whether with Bacon's knowledge and sanction or not, does not appear) — only that an English translation of the *Meditationes Sacræ*, under the title of *Religious Meditations*, was substituted for the original Latin. The translation is upon the whole good, and may well enough have had Bacon's *imprimatur*, though I can hardly think it was his own doing; the rather because, though it was afterwards included in all those editions of the Essays which, being merely reprints, may be supposed to have been printer's speculations in which he took no concern, I do not find in any volume subsequently brought out by himself either the translation or the original. Of the original indeed, which had not been reprinted, he may possibly in later years have been unable to procure a copy: but if he ever cared enough for it to translate it into English with his own hand, it seems unlikely that he should not have cared to preserve the translation. I suppose he added it to his Essays of 1597 in order to make that very thin volume a little thicker: but afterwards, judging it too

slight a thing to stand by itself under such a title, preferred to disperse through his other writings such of the thoughts as he considered worth preserving.

However this may be, there is something in these Meditations very characteristic, and as a sample of what at the age of 37 he thought worth setting down on such subjects, they cannot but be read with interest: none more so perhaps than the meditation *de spe terrestri* — the doctrine of which is not propounded by him elsewhere, as far as I recollect; certainly not in such latitude. The aphorism attributed to Heraclitus, that *dry light is the best soul*, was indeed at all times a favourite with him. But I do not think that he has anywhere else made so resolute an attempt to translate it into a practical precept for the regulation of the mind, and fairly to follow to its legitimate consequences the doctrine that absolute veracity and freedom from all delusion is the only sound condition of the soul. Upon this principle, a reasonable expectation of good to come, formed upon a just estimate of probabilities, is the only kind of *hope* which in the things of this life a man is permitted to indulge: all hope that goes beyond this being to be reserved for the life to come. The spirit of hope must have been strong in Bacon himself, if at the age of 37 he could still believe it possible for man to walk by the light of reason alone. I suppose it did not hold out much longer. His own experience must have taught him that had he never hoped to do more than he succeeded in doing, he could never have had spirit to proceed; and that to reduce hope within the limits of reasonable expectation would be to abjure the *possunt quia posse videntur*, and to clip the wings of enterprise: and he learned before

he died to recommend the "entertaining of hopes" as one of the best medicines for the preservation of health.

The seeds or rough notes of this meditation may be seen fairly written in Bacon's own hand in a loose sheet belonging to the bundle which I have described under the head of *Formularies and Elegancies:* Harl. MSS. 7017. fo. 118. And as those who are curious about his smaller habits and methods of working may like to see it, I subjoin a copy.

Melior est oculorum visio quam animi progressio.

Spes in dolio remansit, sed non ut antidotus, sed ut major morbus.

Spes omnis in futuram vitam consumenda est: Sufficit præsentibus bonis purus sensus.

Spes vigilantis somnium: Vitæ summa brevis spem nos vetat inchoare longam.

Spes facit animos leves, tumidos, inæquales, peregrinantes.

Vidi universos ambulantes sub sole cum adolescente secundo qui consurget post eum.

Imaginationes omnia turbant, timores multiplicant, voluptates corrumpunt.

Anticipatio timoris salubris, ob inventionem remedii; spei inutilis.

Imminent futuro, ingrati in præteritum, semper adolescentes.

Vitam sua sponte fluxam magis fluxam reddimus per continuationes spei.

Præsentia erunt futura, non contra.

# MEDITATIONES SACRÆ.

LONDINI.
Excudebat Johannes Windet.
1597.

1. De Operibus Dei et Hominis.
2. De Miraculis Servatoris.
3. De Columbina Innocentia et Serpentina Prudentia.
4. De Exaltatione Charitatis.
5. De Mensura Curarum.
6. De Spe Terrestri.
7. De Hypocritis.
8. De Impostoribus.
9. De Generibus Impostura.
10. De Atheismo.
11. De Hæresibus.
12. De Ecclesia et Scripturis.

# MEDITATIONES SACRÆ.

## DE OPERIBUS DEI ET HOMINIS.

*Vidit Deus omnia quæ fecerant manus ejus, et erant bona nimis: homo autem conversus ut videret opera quæ fecerunt manus ejus, invenit quod omnia erant vanitas et vexatio spiritus.*[1]

Quare si opera Dei operaberis, sudor tuus ut unguentum aromatum, et feriatio tua ut Sabbatum Dei. Laborabis in sudore bonæ conscientiæ, et feriabere in otio suavissimæ contemplationis. Si autem post magnalia hominum persequeris, erit tibi in operando stimulus et angustia, et in recordando fastidium et exprobratio. Et merito tibi evenit (O homo) ut cum tu qui es opus Dei non retribuas ei beneplacentiam, etiam opera tua reddant tibi fructum similem amaritudinis.

## DE MIRACULIS SERVATORIS.

*Bene omnia fecit.*

Verus plausus: Deus cum universa crearet, vidit quod singula et omnia erant bona nimis. Deus ver-

[1] This paragraph is not printed in a distinct type in the original, as the corresponding paragraphs in the other meditations are. But the printing is in this respect careless throughout; and there can be little doubt that it was meant to stand as a text prefixed to the meditation.

bum in miraculis quæ edidit (omne autem miraculum est nova creatio, et non ex lege primæ creationis) nil facere voluit quod non gratiam et beneficentiam omnino spiraret. Moses edidit miracula, et profligavit Ægyptios pestibus multis; Elias edidit, et occlusit cœlum ne plueret super terram; et rursus eduxit de cœlo ignem Dei super duces et cohortes; Elizeus edidit, et evocavit ursas e deserto quæ laniarent impuberes; Petrus Ananiam sacrilegum hypocritam morte, Paulus Elimam magum cæcitate percussit: Sed nihil hujusmodi fecit Jesus. Descendit super eum spiritus in forma columbæ, de quo dixit, *Nescitis cujus spiritus sitis;* spiritus Jesus, spiritus columbinus: fuerunt illi servi Dei tanquam boves Dei triturantes granum, et conculcantes paleam; sed Jesus Agnus Dei sine ira et judiciis. Omnia ejus miracula circa corpus humanum, et doctrina ejus circa animam humanam. Indiget corpus hominis alimento, defensione ab externis, et cura. Ille multitudinem piscium in retibus congregavit, ut uberiorem victum hominibus præberet. Ille alimentum aquæ in dignius alimentum vini ad exhilarandum cor hominis convertit. Ille ficum, quod officio suo ad quod destinatum fuit, ad cibum hominis videlicet, non fungeretur, arefieri jussit. Ille penuriam piscium et panum ad alendum exercitum populi dilatavit. Ille ventos quod navigantibus minarentur corripuit. Ille claudis motum, cæcis lumen, mutis sermonem, languidis sanitatem, leprosis carnem mundam, dæmoniacis animum integrum, mortuis vitam restituit. Nullum miraculum judicii, omnia beneficentiæ, et circa corpus humanum; nam circa divitias non est dignatus edere miracula; nisi hoc unicum, ut tributum daretur Cæsari.

## DE COLUMBINA INNOCENTIA ET SERPENTINA PRUDENTIA.

*Non accipit stultus verba prudentiæ, nisi ea dixeris quæ versantur in corde ejus.*

Judicio hominis depravato et corrupto, omnis quæ adhibetur eruditio et persuasio irrita est et despectui, quæ non ducit exordium a detectione et repræsentatione malæ complexionis animi sanandi; quemadmodum inutiliter adhibetur medicina non pertentato vulnere. Nam homines malitiosi, qui nihil sani cogitant, præoccupant hoc sibi, ut putent bonitatem ex simplicitate morum ac inscitia quadam et imperitia rerum humanarum gigni. Quare, nisi perspexerint ea quæ versantur in corde suo, id est penitissimas latebras malitiæ suæ, perlustratas esse ei qui suasum molitur, de ridiculo habent verba prudentiæ. Itaque ei qui ad bonitatem aspirat non solitariam et particularem, sed seminalem et genitivam quæ alios trahat, debent esse omnino nota quæ ille vocat *Profunda Satanæ;* ut loquatur cum auctoritate et insinuatione vera. Hinc est illud, *Omnia probate, quod bonum est tenete;* inducens electionem judiciosam ex generali examinatione. Ex eodem fonte est illud; *Estote prudentes sicut serpentes, innocentes sicut columbæ.* Non est dens serpentis, nec venenum, nec aculeus, quæ non probata debeant esse; nec pollutionem quis timeat, nam et sol ingreditur latrinas, nec inquinatur; nec quis se Deum tentare credat, nam ex præcepto est, *et sufficiens est Deus ut vos immaculatos custodiat.*

### DE EXALTATIONE CHARITATIS.

*Si gavisus sum ad ruinam ejus qui oderat me, et exaltavi quod invenisset eum malum.*

Detestatio Job; amicos redamare, est charitas publicanorum ex fœdere utilitatis; versus inimicos autem bene animatos esse, est ex apicibus juris Christiani, et imitatio divinitatis. Rursus tamen hujus charitatis complures sunt gradus, quorum primus est inimicis resipiscentibus ignoscere; ac hujus quidem charitatis etiam apud generosas feras umbra quædam et imago reperitur; nam et leones in se submittentes et prosternentes non ulterius sævire perhibentur. Secundus gradus est inimicis ignoscere, licet sint duriores, et absque reconciliationum piaculis. Tertius gradus est non tantum veniam et gratiam inimicis largiri, sed etiam merita et beneficia in eos conferre. Sed habent hi gradus, aut habere possunt, nescio quid potius ex ostentatione, aut saltem animi magnitudine, quam ex charitate pura. Nam cum quis virtutem ex se emanare et effluere sentit, fieri potest ut is efferatur, et potius virtutis suæ fructu quam salute et bono proximi delectetur. Sed si aliunde malum aliquod inimicum tuum deprehendat, et tu in interioribus cellulis cordis graveris et angustieris, nec, quasi dies ultionis et vindictæ tuæ advenisset, læteris; hoc ego fastigium et exaltationem charitatis esse pono.

### DE MENSURA CURARUM.

*Sufficit diei malitia sua.*

Modus esse in curis humanis debet; alioqui et inutiles sunt, ut quæ animum opprimant et judicium con-

fundant, et profanæ, ut quæ sapiant animum qui perpetuitatem quandam in rebus mundanis sibi spondeat. Hodierni enim debemus esse ob brevitatem ævi, et non crastini, sed, ut ille ait, *carpentes diem;* erunt enim futura præsentia vice sua; quare sufficit solicitudo præsentium. Neque tamen curæ moderatæ, sive sint œconomicæ, sive publicæ, sive rerum mandatarum, notantur. Sed hic duplex est excessus. Primus, cum curarum series in longitudinem nimiam et tempora remotiora extendimus, ac si providentiam divinam apparatu nostro ligare possemus; quod semper etiam apud Ethnicos infaustum et insolens fuit. Fere enim qui fortunæ multum tribuerunt, et ad occasiones præsentes alacres et præsto fuerunt, felicitate magna usi sunt. Qui autem altum sapientes, omnia curata et meditata habere confisi sunt, infortunia subierunt. Secundus excessus est, cum in curis immoramur diutius quam opus est ad justam deliberationem et ad decretum faciendum. Quis enim nostrûm est, qui tantum curet quantum sufficit ut se explicet, vel sese explicare non posse judicet, et non eadem sæpe retractet, et in eodem cogitationum circuitu inutiliter hæreat, et denique evanescat? Quod genus curarum et divinis et humanis rationibus adversissimum est.

### DE SPE TERRESTRI.

*Melior est oculorum visio, quam animi progressio.*

Sensus purus in singula meliorem reddit conditionem et politiam mentis, quam istæ imaginationes et progressiones animi. Natura enim animi humani, etiam in ingeniis gravissimis, est ut a sensu singulorum statim progrediatur et saliat, et omnia auguretur fore talia

quale illud est quod præsentem sensum incutit: si boni est sensus, facilis est ad spem indefinitam; si mali est sensus, ad metum: unde illud, *Fallitur augurio spes bona sæpe suo;* et contra illud, *Pessimus in dubiis augur timor.*[1] Sed tamen timoris est aliquis fructus; præparat enim tolerantiam, et acuit industriam:

> Non ulla laborum,
> O virgo, nova mi facies inopinave surgit:
> Omnia præcepi, atque animo mecum ante peregi.

Spes vero inutile quiddam videtur. Quorsum enim ista anticipatio boni? Attende: si minus eveniat bonum quam speres, bonum licet sit, tamen quia minus sit, videtur damnum potius quam lucrum, ob excessum spei. Si par et tantum sit, et eventus sit spei æqualis, tamen flos boni per spem decerpitur, et videtur fere obsoletum, et fastidio magis finitimum. Si major sit successus spe, videtur aliquid lucri factum; verum est: sed annon melius fuisset sortem lucrifecisse nihil sperando, quam usuram minus sperando? Atque in rebus secundis ita operatur spes; in malis autem robur verum animi solvit. Nam neque semper spei materia suppetit, et destitutione aliqua vel minima spei, universa fere firmitudo animi corruit; et minorem efficit dignitatem mentis, cum mala toleramus alienatione quadam et errore mentis, non fortitudine et judicio. Quare satis leviter finxere poëtæ spem antidotum humanorum morborum esse, quod dolores eorum mitiget, cum sit revera incensio potius et exasperatio, quæ eos multiplicari et recrudescere faciat. Nihilominus fit, ut plerique hominum imaginationibus spei et progressionibus istis mentis omnino se dedant, in-

[1] *timor* is omitted in the original: no doubt by accident. The error was corrected by M. Bouillet; who gives the reference, *Statius, Theb.* lib. iii. v. 6.

gratique in præterita, obliti fere præsentium, semper juvenes, tantum futuris immineant. *Vidi universos ambulantes sub sole cum adolescente secundo, qui consurget post eum; quod pessimus morbus est, et status mentis insanissimus.* Quæras fortasse annon melius sit, cum res in dubia expectatione positæ sint, bene divinare, et potius sperare quam diffidere, cum spes majorem tranquillitatem animi conciliet. Ego sane in omni mora et expectatione tranquillum et non fluctuantem animi statum, ex bona mentis politia et compositione, summum humanæ vitæ firmamentum judico: sed eam tranquillitatem, quæ ex spe pendeat, ut levem et infirmam recuso. Non quia non conveniat tam bona quam mala ex sana et sobria conjectura prævidere et præsupponere, ut actiones ad probabilitatem eventuum magis accommodemus; modo sit hoc officium intellectus ac judicii cum justa inclinatione affectus. Sed quem[1] ita spes coërcuit, ut cum ex vigilanti et firmo mentis discursu meliora, ut magis probabilia, sibi prædixerit, non in ipsa boni anticipatione immoratus sit, et hujusmodi cogitationi, ut somnio placido, indulserit? Atque hoc est quod reddit animum levem, tumidum, inæqualem, peregrinantem. Quare omnis spes in futuram vitam cœlestem consumenda est. Hic autem, quanto purior sit præsentium sensus, absque infectione et tinctura imaginationis, tanto prudentior et melior anima. *Vitæ summa brevis spem nos vetat inchoare longam.*

[1] So in the original. One would rather have expected *quis;* as the translator appears to have read it: "but which of you hath so kept his hopes within limits," &c.

## DE HYPOCRITIS.

*Misericordiam volo, et non sacrificium.*

Omnis jactatio Hypocritarum est in operibus primæ tabulæ legis, quæ est de venerationibus Deo debitis. Ratio duplex est, tum quod hujusmodi opera majorem habent pompam sanctitatis, tum quod cupiditatibus eorum minus adversentur. Itaque redargutio hypocritarum est, ut ab operibus sacrificii remittantur ad opera misericordiæ; unde illud, *Religio munda et immaculata apud Deum et patrem hæc est, visitare pupillos et viduas in tribulatione eorum;* et illud, *Qui non diligit fratrem suum quem vidit, Deum quem non vidit quomodo potest diligere?* Quidam autem altioris et inflatioris hypocrisiæ,[1] seipsos decipientes et existimantes se arctiore cum Deo conversatione dignos, officia charitatis in proximum ut minora negligunt. Qui error monasticæ vitæ non principium quidem dedit (nam initia bona fuerunt), sed excessum addidit. Recte enim dictum est, *Orandi munus magnum esse munus in ecclesia;* et ex usu ecclesiæ est, ut sint cœtus hominum a mundanis curis soluti, qui assiduis et devotis precibus Deum pro ecclesiæ statu sollicitent. Sed huic ordinationi illa hypocrisia finitima est; nec universa institutio reprobatur, sed spiritus illi se efferentes cohibentur: nam et Enoch, qui ambulavit cum Deo, prophetizavit, ut est apud Judam, atque fructu suæ prophetiæ ecclesiam donavit. Et Johannes Baptista, quem principem quidam vitæ monasticæ volunt, multo ministerio functus est tum prophetizationis tum baptizationis. Nam ad alios istos in Deum offi-

[1] So in the original: as also *hypocrisia* a few lines further on: and therefore, I presume, not a misprint.

ciosos refertur illa interrogatio, *Si juste egeris, quid donabis Deo, aut quid de manu tua accipiet?* Quare opera misericordiæ sunt opera discretionis hypocritarum. Contra autem fit cum hæreticis; nam ut hypocritæ, simulata sua sanctitate versus Deum, injurias suas versus homines obducunt; ita hæretici, moralitate quadam versus homines, blasphemias suas contra Deum insinuant.

### DE IMPOSTORIBUS.

*Sive mente excedimus, Deo, sive sobrii sumus vobis.*

Vera est ista effigies et verum temperamentum viri cui religio penitus in præcordiis insedit, et veri operarii Dei. Conversatio ei quæ cum Deo est, plena excessus, et zeli, et extasis. Hinc gemitus ineffabiles et exultationes, et raptus spiritus, et agones. At quæ cum hominibus est, plena mansuetudinis, et sobrietatis, et morigerationis. Hinc *omnia omnibus factus sum*, et hujusmodi. Contra fit in hypocritis et impostoribus: ii enim in populo et ecclesia incendunt se et excedunt, et veluti sacris furoribus afflati omnia miscent. Si quis autem eorum solitudines, et separatas meditationes, et cum Deo conversationes introspiciat, deprehendet eas non tantum frigidas et sine motu, sed plenas malitiæ et fermenti; sobrii Deo, mente excedentes populo.

### DE GENERIBUS IMPOSTURÆ.

*Devita prophanas vocum novitates, et oppositiones falsi nominis scientiæ.*
*Ineptas et aniles fabulas devita.*
*Nemo vos decipiat in sublimitate sermonum.*

Tres sunt sermones et veluti stili imposturæ. Primum

genus est eorum, qui statim ut aliquam materiam nacti sunt, artem conficiunt, vocabula artis imponunt, omnia in distinctiones redigunt, inde posita vel themata educunt, et ex quæstionibus et responsionibus oppositiones conficiunt: hinc Scholasticorum quisquiliæ et turbæ. Secundum genus est eorum, qui vanitate ingenii, ut sacri quidem poëtæ, omnem exemplorum varietatem ad mentes hominum tractandas confingunt: unde vitæ patrum, et antiquorum hæreticorum figmenta innumera. Tertium genus eorum, qui mysteriis et grandiloquiis, allegoriis et allusionibus omnia implent: quod genus mysticum et gnosticum complures hæretici sibi delegerunt. Primum genus sensum et captum hominis illaqueat, secundum allicit, tertium stupefacit; seducunt vero omnia.

## DE ATHEISMO.

*Dixit insipiens in corde suo, non est Deus.*

Primum, dixit in corde; non ait, cogitavit in corde; hoc est, non tam ita sentit penitus, sed vult hoc credere: quoniam expedire sibi videt ut non sit Deus, omni ratione sibi hoc suadere et in animum inducere conatur: et tanquam thema aliquod, vel positum, vel placitum, asserere et adstruere et firmare studet. Manet tamen ille igniculus luminis primi, quo divinitatem agnoscimus, quem prorsus extinguere et stimulum illum ex corde evellere frustra nititur. Quare ex malitia voluntatis suæ, et non ex nativo sensu et judicio, hoc supponit; ut ait comicus poëta, *Tunc animus meus accessit ad meam sententiam*, quasi ipse alter esset ab animo suo. Itaque Atheista magis dixit in corde, quam sentit in corde, quod non sit Deus. Secundo, dixit in corde, non ore

locutus est; sed notandum est hoc metu legis et famæ fieri. Nam ut ait ille, *Negare Deos difficile est in concione populi, sed in consessu familiari expeditum.* Nam si hoc vinculum tollatur e medio, non est hæresis, quæ majore studio se pandere et spargere et multiplicare nitatur, quam Atheismus. Nec videas eos qui in hanc mentis insaniam immersi sunt aliud fere spirare, et importune inculcare, quam verba atheismi: ut in Lucretio Epicureo, qui fere suam in religionem invectivam singulis aliis subjectis intercalarem facit. Ratio videtur esse, quod Atheista, cum sibi non satis acquiescat, æstuans, nec sibi satis credens, et crebra suæ opinionis deliquia in interioribus patiens, ab aliorum assensu refocillari cupit. Nam recte dictum est: *Qui alteri opinionem approbare sedulo cupit, ipse diffidit.* Tertio, insipiens est, qui hoc in corde dixit; quod verissimum est, non tantum quod divina non sapiat, sed etiam secundum hominem. Primo enim ingenia quæ sunt in atheismum proniora, videas fere levia, et dicacia, et audacula, et insolentia: ejus denique compositionis, quæ prudentiæ et gravitati morum adversissima est. Secundo, inter viros politicos, qui altioris ingenii et latioris cordis fuerunt religionem non arte quadam ad populum adhibuerunt, sed interiore dogmate coluere, ut qui providentiæ et fortunæ plurimum tribuerint. Contra, qui artibus suis et industriis, et causis proximis et apparentibus omnia ascripserunt, et, ut ait propheta, *retibus suis immolarunt*, pusilli fuerunt politici, et circumforanei, et magnitudinis actionum incapaces. Tertio, in physicis et illud affirmo, parum philosophiæ naturalis, et in ea progressum liminarem, ad Atheismum opiniones inclinare: contra, multum philosophiæ naturalis, et progressum in ea penetrantem, ad religionem animos circumferre.

Quare Atheismus stultitiæ et inscitiæ ubique convictus esse videtur, ut merito sic dictum insipientium, *Non est Deus.*

### DE HÆRESIBUS.

*Erratis, nescientes Scripturas, neque potestatem Dei.*

Canon iste mater omnium canonum adversus hæreses. Duplex erroris causa, ignoratio voluntatis Dei, et ignoratio vel levior contemplatio potestatis Dei. Voluntas Dei revelatur magis per scripturas, *Scrutamini;* potestas magis per creaturas, *Contemplamini.* Ita asserenda plenitudo potestatis Dei, ne maculemus voluntatem. Ita asserenda bonitas voluntatis, ne minuamus potestatem. Itaque religio vera sita est in mediocritate, inter superstitionem cum hæresibus superstitiosis ex una parte, et atheismum cum hæresibus prophanis ex altera. Superstitio, repudiata luce scripturarum, seque dedens traditionibus pravis vel apocryphis, et novis revelationibus, vel falsis interpretationibus scripturarum, multa de voluntate Dei fingit et somniat, a scripturis devia et aliena. Atheismus autem et theomachia contra potestatem Dei insurgit et tumultuatur, verbo Dei non credens, quod voluntatem ejus revelat, ob incredulitatem potestatis ejus, cui omnia sunt possibilia. Hæreses autem, quæ ex isto fonte emanant, graviores videntur cæteris. Nam et in politiis atrocius est potestatem et majestatem minuere, quam famam principis notare. Hæresium autem quæ potestatem Dei minuunt, præter atheismum purum tres sunt gradus, habentque unum et idem mysterium (nam omnis antichristianismus operatur in mysterio, id est, sub imagine boni;) hoc ipsum, ut voluntatem Dei ab omni aspersione malitiæ liberent.

Primus gradus est eorum, qui duo principia constituunt paria, ac inter se pugnantia et contraria, unum boni, alterum mali. Secundus gradus est eorum, quibus nimium læsa videtur majestas Dei, in constituendo adversus eum principio affirmativo et activo: quare exturbata tali audacia, nihilominus inducunt contra Deum principium negativum et privativum. Nam volunt esse opus ipsius materiæ et creaturæ internum et nativum et substantivum, ut ex se vergat et relabatur ad confusionem et ad nihilum; nescientes ejusdem esse omnipotentiæ ex aliquo nihil facere, cujus ex nihilo aliquid. Tertius gradus est eorum, qui arctant et restringunt opinionem priorem tantum ad actiones humanas, quæ participant ex peccato, quas volunt substantive, absque nexu aliquo causarum, ex interna voluntate et arbitrio humano pendere; statuuntque latiores terminos scientiæ Dei quam potestatis, vel potius ejus partis potestatis Dei (nam et ipsa scientia potestas est) qua scit, quam ejus qua movet et agit; ut præsciat quædam otiose, quæ non prædestinet et præordinet. Et non absimile est figmento quod Epicurus introduxit in Democritismum, ut fatum tolleret et fortunæ locum daret; declinationem videlicet atomi; quod semper a prudentioribus inanissimum commentum habitum est. Sed quidquid a Deo non pendet, ut authore et principio, per nexus et gradus subordinatos, id loco Dei erit, et novum principium, et deaster quidam. Quare merito illa opinio respuitur, ut læsio et diminutio majestatis et potestatis Dei. Et tamen admodum recte dicitur quod *Deus non sit author mali*, non quia non author, sed quia non mali.

DE ECCLESIA ET SCRIPTURIS.

*Proteges eos in tabernaculo tuo a contradictione linguarum.*

Contradictiones linguarum ubique occurrunt, extra tabernaculum Dei. Quare quocunque te verteris, exitum controversiarum non reperies nisi huc te receperis. Dices, verum est, nempe in unitatem ecclesiæ. Sed adverte. Erat in tabernaculo arca, et in arca testimonium vel tabulæ legis. Quid mihi narras corticem tabernaculi, sine nucleo testimonii? Tabernaculum ad custodiendum et tradendum testimonium erat ordinatum. Eodem modo et ecclesiæ custodia et traditio per manus scripturarum demandata est, sed anima tabernaculi est testimonium.

# RELIGIOUS MEDITATIONS.

## OF THE WORKS OF GOD AND THE WORKS OF MAN.

*God saw all that he had made and behold it was very good: But man when he turned to look on the works that his hands had wrought, found that all was vanity and vexation of spirit.*

Wherefore if thou labour in God's works, thy sweat shall be as a sweet ointment, and thy rest as the Sabbath of God: thou shalt labour in the sweat of a good conscience, and thou shalt take rest in the leisure of delightful contemplation. But if thou follow after the mighty things of men, thou shalt work in pain and distress, and thou shalt look back upon thy work with disgust and reproach. And justly doth it happen to thee, O man, that seeing thou thyself that art the work of God requitest him not with well pleasing, even so thine own works bear thee the like fruit of bitterness.

## OF THE MIRACLES OF OUR SAVIOUR.

*He hath done all things well.*

A true applause. God, when he created all things, saw that each and all was exceeding good. God the

Word, in the miracles which he wrought (and every miracle is a new creation, and not according to the law of the first creation), would do nothing that was not altogether matter of grace and beneficence. Moses wrought miracles, and destroyed the Egyptians with many plagues: Elijah wrought miracles, and shut up heaven that no rain should fall upon the earth; and again called down fire from heaven to consume the captains and their fifties: Elisha wrought miracles, and brought she-bears out of the wood to tear the little children: Peter smote Ananias the sacrilegious hypocrite with death; Paul, Elymas the Sorcerer with blindness. But nothing of this kind was done by Jesus. Upon him the spirit descended in the form of a dove; whereof he said, *ye know not of what spirit ye are.* The spirit of Jesus was the spirit of the dove. Those servants of God were as God's oxen, treading out the corn and trampling the chaff under their feet; Jesus was the Lamb of God, without wrath or judgments. All his miracles were for the benefit of the human body, his doctrine for the benefit of the human soul. The body of man stands in need of nourishment, of defence from outward accidents, of medicine. He gathered the multitude of fishes into the nets, whereby to supply men with more plentiful food. He turned water into the worthier nourishment of wine, to glad man's heart. He caused the fig tree, because it failed of its appointed office (that of yielding food for man), to wither away. He multiplied the scanty store of loaves and fishes that the host of people might be fed. He rebuked the winds because they threatened danger to them that were in the ship. He restored motion to the lame, light to the blind, speech to the dumb, health

to the sick, cleanness to the lepers, sound mind to them that were possessed of devils, life to the dead. There was no miracle of judgment, but all of mercy, and all upon the human body. For with reference to riches, he deigned not to work any miracles; except that one about giving tribute to Cæsar.

### OF THE INNOCENCY OF THE DOVE AND THE WISDOM OF THE SERPENT.

*The fool receiveth not the word of wisdom, except thou discover to him what he hath in his heart.*

To a man of perverse and corrupt judgment all instruction or persuasion is fruitless and contemptible which begins not with discovery and laying open of the distemper and ill complexion of the mind which is to be recured: as a plaster is unseasonably applied before the wound be searched. For men of corrupt understanding, that have lost all sound discerning of good and evil, come possessed with this prejudicate opinion, that they think all honesty and goodness proceedeth out of a simplicity of manners, and a kind of want of experience and unacquaintance with the affairs of the world. Therefore except they may perceive those things which are in their hearts, that is to say their own corrupt principles and the deepest reaches of their cunning and rottenness, to be throughly sounded and known to him that goes about to persuade with them, they make but a play of the words of wisdom. Therefore it behoveth him which aspireth to a goodness not retired or particular to himself, but a fructifying and begetting goodness, which should draw on others, to know those points which be called in the Revelation

*the deeps of Satan;* that he may speak with authority and true insinuation. Hence is the precept: *Try all things, and hold that which is good:* which induceth a discerning election out of an examination whence nothing at all is excluded. Out of the same fountain ariseth that direction: *Be you wise as Serpents, and innocent as Doves.* There are neither teeth nor stings, nor venom, nor wreaths and folds of serpents, which ought not to be all known, and as far as examination doth lead, tried: neither let any man here fear infection or pollution; for the sun entereth into sinks and is not defiled. Neither let any man think that herein he tempteth God; for his diligence and generality of examination is commanded; and *God is sufficient to preserve you immaculate and pure.*[1]

### OF THE EXALTATION OF CHARITY.

*If I rejoiced at the destruction of him who hated me, and lifted up myself when evil found him.*

The protestation of Job. To love them that love us is the charity of the Publicans, upon contract of utility: but to be kindly disposed towards our enemies is one of the highest points of the Christian law, and an imitation of divinity. Yet again of this charity there are many degrees. Whereof the first is to forgive our enemies when they repent: and of this there is found even among the more generous kinds of wild beasts some shadow or image: for lions also are said to be no longer savage towards those who yield and pros-

[1] I have here merely transcribed the old translation; which seems to me particularly well done, and being rather freer and fuller than the others, may possibly have some of Bacon's own hand in it.

trate themselves. The second degree is to forgive our enemies though they be more obstinate, and without offerings of reconciliation. The third degree is, not only to accord pardon and grace, but to confer upon them favours and benefits. Nevertheless all these degrees have, or may have, something in them of ostentation, or at least of magnanimity, rather than of pure charity. For when a man feels that virtue is proceeding from him, it may be that he feels a pride in it, and is taking delight more in the fruit of his own virtue than in the welfare and good of his neighbour. But if evil overtake your enemy from elsewhere, and you in the inmost recesses of your heart are grieved and distressed, and feel no touch of joy, as thinking that the day of your revenge and redress has come; — this I account to be the summit and exaltation of Charity.

### OF MODERATION OF CARES.

*Sufficient unto the day is the evil thereof.*

There ought to be a measure kept in human cares. Else are they both unprofitable, as oppressing the mind and confounding the judgment; and profane, as savouring of a mind which promises to itself a kind of perpetuity in things of this world. For we ought to be creatures of to-day, by reason of the shortness of life, not of to-morrow: but, as he says, *seizing the present time:* for to-morrow will have its turn and become to-day: and therefore it is enough if we take thought for the present. Not that moderate cares, whether for a man's family or for the public or for business committed to his charge, are reprehended. But herein is a twofold excess. The first, when we carry our cares to too

great length and into times too far off, as if we could bind divine providence by our arrangements; a thing which even among the Heathen was ever held insolent and unlucky. For it has commonly been seen that those who have attributed much to fortune and held themselves alert and vigilant to use occasions as they present themselves, have enjoyed great prosperity; whereas deep schemers who have trusted to have all things cared for and considered, have been unfortunate. The second kind of excess is, when we dwell on our cares longer than is necessary for just deliberation and decision. For which of us is there who cares only so much as is necessary that he may know what to do, or know that he can do nothing: and does not turn the same things over and over in his mind, and hang uselessly in the same circle of cogitations, till he loses himself in them? Which kind of cares is most adverse both to divine and human considerations.

### OF EARTHLY HOPE.

*Better is the sight of the eyes than the wandering of the desire.*

The sense which takes everything simply as it is makes a better mental condition and estate than those imaginations and wanderings of the mind. For it is the nature of the human mind, even in the gravest wits, the moment it receives an impression of anything, to sally forth and spring forward and expect to find everything else in harmony with it: if it be an impression of good, then it is prone to indefinite hope; if of evil, to fear. Whence it is said,

**By her own tales is Hope full oft deceived.**

and on the other hand,

> In doubtful times Fear still forbodes the worst.

In fear however there is some advantage: it prepares endurance and sharpens industry.

> The task can show no face that's strange to me:
> Each chance I have pondered, and in thought rehearsed.

But in hope there seems to be no use. For what avails that anticipation of good? If the good turn out less than you hoped for, good though it be, yet because it is not *so* good, it seems to you more like a loss than a gain, by reason of the overhope. If neither more nor less, but so; the event being equal and answerable to the hope; yet the flower of it having been by that hope already gathered, you find it a stale thing and almost distasteful. If the good be beyond the hope, then no doubt there is a sense of gain: true: yet had it not been better to gain the whole by hoping not at all, than the difference by hoping too little? And such is the effect of hope in prosperity. But in adversity it enervates the true strength of the mind. For matter of hope cannot always be forthcoming; and if it fail, though but for a moment, the whole strength and support of the mind goes with it. Moreover the mind suffers in dignity, when we endure evil only by self-deception and looking another way, and not by fortitude and judgment. And therefore it was an idle fiction of the poets to make Hope the antidote of human diseases, because it mitigates the pain of them; whereas it is in fact an inflammation and exasperation of them rather, multiplying and making them break out afresh. So it is nevertheless, that most men give themselves up entirely to imaginations of hope and these wanderings of the

mind, and thankless for the past, scarce attending to the present, ever young, hang merely upon the future. *I beheld all that walk under the sun with the next youth that shall rise after him; which is a sore disease and a great madness of the mind.* You will ask perhaps if it be not better, when a man knows not what to expect, that he should divine well of the future, and rather hope than distrust, seeing that hope makes the mind more tranquil. Certainly in all delay and expectation to keep the mind tranquil and steadfast by the good government and composure of the same, I hold to be the chief firmament of human life; but such tranquillity as depends upon hope I reject, as light and unsure. Not but it is fit to foresee and presuppose upon sound and sober conjecture good things as well as evil, that we may the better fit our actions to the probable event: only this must be the work of the understanding and judgment, with a just inclination of the feeling. But who is there whose hopes are so ordered that when once he has concluded with himself out of a vigilant and steady consideration of probabilities that better things are coming, he has not dwelt upon the very anticipation of good, and indulged in that kind of thought as in a pleasant dream? And this it is which makes the mind light, frothy, unequal, wandering. Therefore all hope is to be employed upon the life to come in heaven: but here on earth, by how much purer is the sense of things present, without infection or tincture of imagination, by so much wiser and better is the soul.

Long hope to cherish in so short a span
Befits not man.

### OF HYPOCRITES.

*I will have mercy and not sacrifice.*

The ostentation of hypocrites is ever confined to the works of the first table of the law, which prescribes our duties to God. The reason is twofold: both because works of this class have a greater pomp of sanctity, and because they interfere less with their desires. The way to convict a hypocrite therefore is to send him from the works of sacrifice, to the works of mercy. Whence the text: *Pure religion and undefiled before God and the Father is this, to visit the orphans and widows in their affliction*; and that other, *He who loveth not his brother whom he hath seen, how shall he love God whom he hath not seen?* There are some however of a deeper and more inflated hypocrisy, who deceiving themselves, and fancying themselves worthy of a closer conversation with God, neglect the duties of charity towards their neighbour, as inferior matters. By which error the life monastic was, not indeed originated (for the beginning was good), but carried into excess. For it is rightly said *that the office of prayer is a great office in the Church;* and it is for the service of the Church that there should be companies of men relieved from cares of the world, who may pray to God without ceasing for the state of the Church. But this institution is a near neighbour to that form of hypocrisy which I speak of: nor is the institution itself meant to be condemned; but only those self-exalting spirits to be restrained. For both Enoch, he who walked with God, prophecied, as we know from Jude, and endowed the Church with the fruit of his proph-

ecy; and John the Baptist, whom some would have to be the founder of the life monastic, exercised much ministry both of prophecy and baptism. For it is to those others, who are so officious towards God, that that question is applied: *If thou be righteous what givest thou him, or what receiveth he of thine hand?* The works of mercy therefore are the works whereby to distinguish hypocrites. With heretics on the contrary it is otherwise: for as hypocrites seek by a pretended holiness towards God to cover their injuries towards men; so heretics seek by a certain moral carriage towards men to make a passage for their blasphemies against God.

### OF IMPOSTORS.

*Whether we be beside ourselves, it is to God; or whether we be sober, it is for your cause.*

Here is the true image and true temper of a man who has religion deeply seated in his heart, and is God's faithful workman. His carriage and conversation towards God is full of excess, of zeal, of extasy. Hence groans unspeakable, and exultations, and raptures of spirit, and agonies. His bearing and conversation with men on the contrary is full of mildness and sobriety and appliable demeanour: whence that saying, *I am become all things to all men*, and the like. Contrary it is with hypocrites and impostors: for they in the Church and towards the people set themselves on fire, and are carried as it were out of themselves, and becoming as men inspired with holy furies, they set heaven and earth together. But if a man should look into their times of solitude, and separate meditations,

and conversations with God, he would find them not only cold and without life, but full of malice and leaven; *sober towards God; beside themselves to the people.*

### OF THE KINDS OF IMPOSTURE.

*Avoid profane novelties of terms and oppositions of science falsely so called.*
*Avoid fond and idle fables.*
*Let no man deceive you with high speech.*

There are three kinds of speech, and as it were styles of imposture. The first kind is of those who, as soon as they get any subject-matter, straightway make an art of it, fit it with technical terms, reduce all into distinctions, thence educe positions and assertions, and frame oppositions by questions and answers. Hence the rubbish and pother of the schoolmen. The second kind is of those who through vanity of wit, as a kind of holy poets, imagine and invent all variety of stories and examples, for the training and moulding of men's minds: whence the lives of the fathers, and innumerable figments of the ancient heretics. The third kind is of those who fill everything with mysteries and high-sounding phrases, allegories and allusions: which mystic and Gnostic style of discourse a great number of heretics have adopted. Of these kinds, the first catches and entangles man's sense and understanding, the second allures, the third astonishes: all seduce it.

OF ATHEISM.

*The fool hath said in his heart, There is no God.*

First, *he hath said in his heart;* it is not said, *he hath thought in his heart;* that is, it is not so much that he feels it inwardly, as that he wishes to believe it. Because he sees that it would be good for him that there were no God, he strives by all means to persuade himself of it and induce himself to think so; and sets it up as a theme or position or dogma, which he studies to assert and maintain and establish. Nevertheless there remains in him that sparkle of the original light whereby we acknowledge a divinity, to extinguish which utterly, and pluck the instinct out of his heart, he strives in vain. And therefore it is out of the malice of his will, not out of his natural sense and judgment, that he makes this supposition: as the comic poet says *Then came my mind over to my opinion;* as though himself and his mind were not one. And so it is true that the Atheist has rather said in his heart than thinks in his heart that there is no God.

Secondly, he hath said it in his heart: he hath not spoken it with his mouth. But note that this is from fear of law and opinion: as one says, *It is a hard matter to deny the Gods in a public assembly, but in a familiar conference it is easy enough.* For if this restraint were removed, there is no heresy which strives with more zeal to spread and sow and multiply itself, than Atheism. Nor shall you see those who are fallen into this phrensy to breathe and importunately inculcate anything else almost, than speech tending to Atheism; as in Lucretius the Epicurean; who makes his invec-

tive against religion almost as the burthen or verse of return to every other subject. The reason appears to be that the Atheist, not being well satisfied in his own mind, tossing to and fro, distrustful of himself, and finding many times his opinion faint within him, desires to have it revived by the assent of others. For it is rightly said that *he who is very anxious to approve his opinion to another, himself distrusts it.*

Thirdly, he is a fool who has said this in his heart; which is most true: a fool, not only as wanting wisdom in divine matters, but humanly also. For first, you will find those wits which are prone to Atheism to be commonly light and scoffing and rash and insolent: of that composition in short which is most opposed to wisdom and gravity. Secondly, among statesmen, the deeper wits and larger hearts have not made pretence of religion to the people, but have in their private and inward opinion paid respect to it, as those who have attributed most to providence and fortune: while those on the contrary who have ascribed everything to their own arts and industries, and to immediate and apparent causes, and *sacrificed* (as the prophet says) *to their own nets*, have been paltry politicians, and mountebanks, and incapable of great actions. Thirdly, in physics likewise I maintain this — that a little natural philosophy and the first entrance into it inclines men's opinions to Atheism; but on the other hand much natural philosophy and a deeper progress into it brings men's minds about again to religion. So that Atheism appears to be convicted on all sides of folly and ignorance: and it is truly the saying of fools, that there is no God.

OF HERESIES.

*Ye err, not knowing the Scriptures nor the power of God.*

This canon is the mother of all canons against heresies. The cause of error is twofold: ignorance of the will of God, and ignorance or superficial consideration of the power of God. The will of God is more revealed through the Scriptures: *Search the Scriptures;* his power more through his creatures: *Behold and consider the creatures.* So is the plenitude of God's power to be asserted, as not to involve any imputation upon his will. So is the goodness of his will to be asserted, as not to imply any derogation of his power. True religion therefore is seated in the mean, between Superstition with superstitious heresies on one side, and Atheism with profane heresies on the other. Superstition, rejecting the light of the Scriptures, and giving itself up to corrupt or apocryphal traditions, and new revelations or false interpretations of the Scriptures, invents and dreams many things concerning the will of God which are astray and alien from the Scriptures. Atheism and Theomachy rebels and mutinies against the power of God; not trusting to his word, which reveals his will, because it does not believe in his power, to whom all things are possible. Now the heresies which spring from this source appear to be more heinous than the rest: for in civil government also it is a more atrocious thing to deny the power and majesty of the prince, than to slander his reputation. But of the heresies which deny the power of God, there are, besides simple atheism, three degrees; and they have all one and the same mystery (for all antichris-

tianism works in a mystery, that is under a shadow of good); namely to discharge the will of God from all imputation of evil. The first degree is of those who set up two equal and contrary principles, at war with one another, one of good the other of ill. The second is of those who think it too injurious to the majesty of God to allow of an active and affirmative principle being set up against him; and therefore reject such boldness; but nevertheless bring in a negative and privative principle in opposition to him. For they suppose it to be the inherent natural and substantive operation of matter itself and the creature, to tend and fall back of itself into confusion and nothingness: not knowing that it is no less the work of omnipotence to make nothing of something, than to make something of nothing. The third degree is of those who limit and restrain the former opinion to human actions only, which partake of sin: which actions they suppose to depend substantively and without any chain of causes upon the inward will and choice of man; and who give a wider range to the knowledge of God than to his power; or rather to that part of God's power (for knowledge itself is power) whereby he knows, than to that whereby he works and acts; suffering him to foreknow some things as an unconcerned looker on, which he does not predestine and preordain: a notion not unlike the figment which Epicurus introduced into the philosophy of Democritus, to get rid of fate and make room for fortune; namely the sidelong motion of the Atom; which has ever by the wiser sort been accounted a very empty device. But the fact is that whatever does not depend upon God as author and principle, by links and subordinate degrees, the same

will be instead of God, and a new principle and kind of usurping God. And therefore that opinion is rightly rejected as treason against the majesty and power of God. And yet for all that it is very truly said that *God is not the author of evil;* not because he is not author, — but because not of evil.

### OF THE CHURCH AND THE SCRIPTURES.

*Thou shalt protect them in thy tabernacle from the contradiction of tongues.*

Contradictions of tongues are found everywhere out of the tabernacle of God: turn which way you will therefore, you will find no end of controversies unless you betake yourself thither. True, you all say — namely to the unity of the Church. But observe. In the tabernacle was the ark, and in the ark was the testimony or tables of the law. Why do you talk to me of the tabernacle, which is the shell; without the testimony, which is the kernel? The tabernacle was ordained for the custody and handing down of the testimony. In like manner to the Church is committed the custody and handing down of the Scriptures: but the soul of the tabernacle is the testimony.

# PRAYERS.

# PREFACE.

Of the three prayers which follow, the two first come from the *Baconiana*, and would be accepted as genuine compositions of Bacon's on Tenison's authority, even if we did not find Latin versions of them in works published by himself. The third is of more doubtful authenticity; being attributed to Bacon on no better authority (so far as I know) than that of the unknown editor of the *Remains;* who prints it at the end of the volume, immediately after the Confession of Faith. That Dr. Rawley makes no mention of it, is not perhaps to be taken as a proof that he thought it not genuine; because it belongs to a class of compositions which he did not consider proper for publication; and Tenison's silence may mean no more than that he had no evidence that it *was* genuine; for if he had found any copy of it among Bacon's papers, he would probably either have printed it with the other two, or referred to it as already printed. The external evidence therefore cannot be considered conclusive either way; but inclines if anything against it. Nor does the internal evidence help much to settle the question. The language of devotion is a common language and tends to drown the distinctions of personal style. I cannot say that there is

any thing in it which strikes me as decidedly unlike Bacon; and my chief reason for doubting that it is his, is that neither does it contain anything which strikes me as decidedly like him. And with this mark of doubt upon it, it may take its place with the others.

A fourth prayer of Bacon's there is, of the authenticity of which I have no doubt. But as its peculiar significance depends upon the occasion on which it was composed, I reserve it for its place among the Occasional Works.

# PRAYERS.

## TWO PRAYERS

COMPOSED BY SIR FRANCIS BACON, BARON OF VERULAM AND VISCOUNT ST. ALBAN.[1]

*The first Prayer, called by his Lordship*

THE STUDENT'S PRAYER.

To God the Father, God the Word, God the Spirit, we pour forth most humble and hearty supplications; that He, remembering the calamities of mankind and the pilgrimage of this our life, in which we wear out days few and evil, would please to open to us new refreshments out of the fountains of his goodness, for the alleviating of our miseries. This also we humbly and earnestly beg, that Human things may not prejudice such as are Divine; neither that from the unlocking of the gates of sense, and the kindling of a greater natural light, anything of incredulity or intellectual night may arise in our minds towards the Divine Mysteries. But rather that by our mind

[1] Baconiana, p. 181.

throughly cleansed and purged from fancy and vanities, and yet subject and perfectly given up to the Divine Oracles, there may be given unto Faith the things that are Faith's. Amen.

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*The second Prayer, called by his Lordship*

THE WRITER'S PRAYER.

THOU, O Father! who gavest the Visible Light as the first-born of thy Creatures, and didst pour into man the Intellectual Light as the top and consummation of thy workmanship, be pleased to protect and govern this work, which coming from thy Goodness returneth to thy Glory. Thou, after thou hadst reviewed the works which thy hands had made, beheldest that *everything was very good;* and thou didst rest with complacency in them. But Man reflecting on the works which he had made, saw that *all was vanity and vexation of Spirit*, and could by no means acquiesce in them. Wherefore if we labour in thy works with the sweat of our brows, thou wilt make us partakers of thy Vision and thy Sabbath. We humbly beg that this mind may be steadfastly in us, and that thou, by our hands and also by the hands of others on whom thou shalt bestow the same spirit, wilt please to convey a largeness of new alms to thy family of Mankind. These things we commend to thy everlasting love, by our Jesus, thy Christ, God with us. Amen.

## A PRAYER

*Made and used by the late Lord Chancellor.*[1]

O ETERNAL God, and most merciful Father in Jesus Christ in whom thou hast made.[2] Let the words of our mouths, and the meditations of our hearts be now and ever gracious in thy sight, and acceptable unto thee, O Lord, our God, our strength, and our Redeemer.

O Eternal God, and most merciful Father in Jesus Christ, in whom thou hast made a covenant of grace and mercy with all those that come unto thee in him; in his name and mediation we humbly prostrate ourselves before the throne of thy mercies' seat, acknowledging that by the breach of all thy holy laws and commandments, we are become wild olive branches, strangers to thy covenant of grace; we have defaced in ourselves thy sacred image imprinted in us by creation; we have sinned against heaven and before thee, and are no more worthy to be called thy children. O admit us into the place even of hired servants. Lord, thou hast formed us in our mothers' wombs, thy providence hath hitherto watched over us, and preserved us unto this period of time: O stay not the course of thy mercies and loving-kindness towards us: have mercy upon us, O Lord, for thy dear Son Christ Jesus sake, who is the way, the truth, and the life. In him, O Lord, we appeal from thy justice to thy mercy, beseeching thee in his name, and for his sake

[1] Remains, p. 101.

[2] So in the original. There has been some confusion between the first and second paragraphs; but one cannot well tell where it begins.

only, thou wilt be graciously pleased freely to pardon and forgive us all our sins and disobedience, whether in thought, word, or deed, committed against thy divine Majesty; and in his precious blood-shedding, death, and perfect obedience, free us from the guilt, the stain, the punishment, and dominion of all our sins, and clothe us with his perfect righteousness. There is mercy with thee, O Lord, that thou mayest be feared; yea, thy mercies swallow up the greatness of our sins: speak peace to our souls and consciences; make us happy in the free remission of all our sins, and be reconciled to thy poor servants in Jesus Christ, in whom thou art well pleased: suffer not the works of thine own hands to perish; thou art not delighted in the death of sinners, but in their conversion. Turn our hearts, and we shall be turned; convert us, and we shall be converted; illuminate the eyes of our minds and understanding with the bright beams of thy Holy Spirit, that we may daily grow in the saving knowledge of the heavenly mystery of our redemption, wrought by our dear Lord and Saviour Jesus Christ; sanctify our wills and affection by the same Spirit, the most sacred fountain of all grace and goodness; reduce them to the obedience of thy most holy will in the practice of all piety toward thee, and charity towards all men. Inflame our hearts with thy love, cast forth of them what displeaseth thee, all infidelity, hardness of heart, profaneness, hypocrisy, contempt of thy holy word and ordinances, all uncleanness, and whatsoever advanceth itself in opposition to thy holy will. And grant that henceforth, through thy grace, we may be enabled to lead a godly, holy, sober, and Christian life, in true sincerity and upright-

ness of heart before thee. To this end, plant thy holy fear in our hearts, grant that it may never depart from before our eyes, but continually guide our feet in the paths of thy righteousness, and in the ways of thy commandments: increase our weak faith, grant it may daily bring forth the true fruits of unfeigned repentance, that by the power of the death of our Lord and Saviour Jesus Christ we may daily die unto sin, and by the power of his resurrection we may be quickened, and raised up to newness of life, may truly be born anew, and may be effectually made partakers of the first resurrection, that then the second death may never have dominion over us. Teach us, O Lord, so to number our days, that we may apply our hearts unto wisdom; make us ever mindful of our last end, and continually to exercise the knowledge of grace in our hearts, that in the said divorce of soul and body, we may be translated here to that kingdom of glory prepared for all those that love thee, and shall trust in thee; even then and ever, O Lord, let thy holy angels pitch their tents round about us, to guard and defend us from all the malice of Satan, and from all perils both of soul and body. Pardon all our unthankfulness, make us daily more and more thankful for all thy mercies and benefits daily poured down upon us. Let these our humble prayers ascend to the throne of grace, and be granted not only for these mercies, but for whatsoever else thy wisdom knows needful for us; and for all those that are in need, misery, and distress, whom, Lord, thou hast afflicted either in soul or body, grant them patience and perseverance in the end, and to the end: And

that, O Lord, not for any merits of ours, but only for the merits[1] of thy Son, and our alone Saviour Christ Jesus; to whom with thee and the Holy Spirit be ascribed all glory, &c. *Amen.*

[1] The original has "not for any merits of thy son:" the omitted words have been supplied by an obvious conjecture; but I do not know by whom.

# TRANSLATION OF CERTAIN PSALMS.

# PREFACE.

THE *translation of certain Psalms into English verse* (the only verses certainly of Bacon's making that have come down to us, and probably with one or two slight exceptions the only verses he ever attempted,) was made, as the collection of Apophthegms also was, during a fit of sickness in 1624. Had it been merely composed, fairly copied, and presented with a grateful and graceful dedication to his friend George Herbert, there would have been nothing in the matter to call for explanation. A full mind, accustomed to work under the excitement of an eager temperament and the consciousness of great purposes unaccomplished and the time fast approaching when no man can work, cannot find rest in inaction; but only in some other mode of activity, which may occupy without exciting or too deeply engaging it. For this purpose no exercises can be better than the turning over and reviewing of the miscellaneous stores of the memory, and the mechanical process of arranging words in metre.

> But for the unquiet heart and brain
> A use in measured language lies:
> The sad mechanic exercise,
> Like dull narcotics, numbing pain.

Bacon however not only composed these two little

works, but published them:[1] a fact which, considering how little he had cared to publish during the first sixty years of his life, and how many things of weightier character and more careful workmanship he had then by him in his cabinet, (including the entire contents of the *Miscellany works* and the *Resuscitatio*,) is somewhat remarkable. My own conjecture is, that things of more serious import he did not like to publish in an imperfect shape as long as he could hope to perfect them, but that he owed money to his printer and bookseller, and if such trifles as these would help to pay it, he had no objection to their being used for the purpose.

In compositions upon which a man would have thought it a culpable waste of time to bestow any serious labour, it would be idle to seek either for indications of his taste or for a measure of his powers. And yet as Bacon could not have gone on turning so many of the Psalms into verse without thinking a good deal about the way in which it should be done, there is some interest in watching his progress. At first he seems to have tried to keep close to the text: adding no more than the necessities of metre required. His two first experiments appear to be done on this principle, and the effect is flat enough. I fancy too that he felt it to be so. For as he advances he falls more and more into a kind of paraphrase; in which the inevitable loss of lyric fire and force is in some degree compensated by the development of meanings which are implied or suggested by the original, but not so as to strike the imagination of a modern reader; so that the translation serves for a kind of poetical com-

[1] In December 1624. See Court and Times of James I., ii. p. 486.

mentary; and, though far from representing the effect of the original in itself, holds up a light to read it by. For myself at least I may say that, deeply pathetic as the opening of the 137th psalm always seemed to me, I have found it much more affecting since I read Bacon's paraphrase of it.

"By the waters of Babylon we sat down, and wept when we remembered Sion. As for our harps, we hanged them up upon the trees that are therein. For they that led us away captive required of us then a song, and melody in our heaviness," &c.

When as we sate, all sad and desolate,
By Babylon upon the river's side,
*Eased from the tasks which in our captive state*
*We were enforced daily to abide,*
Our harps we had brought with us to the field,
*Some solace to our heavy souls to yield.*

But soon we found we fail'd of our account:
For *when our minds some freedom did obtain,*
Straightways the memory of Sion Mount
Did cause afresh our wounds to bleed again;
So that with present griefs and future fears
Our eyes burst forth into a stream of tears.

As for our harps, *since sorrow struck them dumb,*
We hang'd them on the willow trees were near, &c.

To those who heard the psalm sung, a word was enough to bring the whole scene with all its pathetic circumstances to the mind; — the short respite from servile toil, the recurrence of the thoughts to Sion, and the overpowering recollections awakened by the melody. But to us they are not obvious enough to make description superfluous; and I doubt whether there are many readers who fully realise the situation. All poetry, but more especially lyrical poetry, requires many things to be translated besides the words, before it can

bear flower and fruit in another language and another age. And it is possible that if an attempt were made to translate the Psalms of David on this principle, it might not end (as almost all attempts have ended hitherto) in the degradation of them out of very rich prose into very poor verse.

Of these verses of Bacon's it has been usual to speak not only as a failure, but as a ridiculous failure: a censure in which I cannot concur. An unpractised versifier, who will not take time and trouble about the work, must of course leave many bad verses: for poetic feeling and imagination, though they will dislike a wrong word, will not of themselves suggest a right one that will suit metre and rhyme: and it would be easy to quote from the few pages that follow, not only many bad lines, but many poor stanzas. But in a work that is executed carelessly or hastily, we must look at the best parts, and not at the worst, for signs of what a man can do. And taking this test, I should myself infer from this sample that Bacon had all the natural faculties which a poet wants: a fine ear for metre, a fine feeling for imaginative effect in words, and a vein of poetic passion.

> Thou carriest man away as with a tide;
> *Then down swim all his thoughts that mounted high*;
> Much like a mocking dream, that will not *bide*,
> But flies before the sight of waking eye;
> Or as the grass, that cannot term obtain
> *To see the Summer come about again.*

The thought in the second line could not well be fitted with imagery words and rhythm more apt and imaginative; and there is a tenderness of expression in the concluding couplet which comes manifestly out

of a heart in sensitive sympathy with nature, and fully capable of the poet's faith

> that every flower
> Enjoys the air it breathes.

Take again, as a sample of versification, the opening of the hundred and fourth psalm:

> Father and King of Powers, both high and low,
> Whose sounding fame all creatures serve to blow;
> My voice shall with the rest strike up thy praise
> And carol of thy works and wondrous ways.
> But who can blaze thy beauties, Lord, aright?
> They turn the brittle beams of mortal sight.
> Upon thy head thou wear'st a glorious crown,
> All set with virtues, polish'd with renown;
> Thence round about a silver veil doth fall
> Of crystal light, mother of colours all; &c.

The heroic couplet could hardly do its work better in the hands of Dryden.

The truth is that Bacon was not without the "fine phrensy" of the poet; but the world into which it transported him was one which, while it promised visions more glorious than any poet could imagine, promised them upon the express condition that fiction should be utterly prohibited and excluded. Had it taken the ordinary direction, I have little doubt that it would have carried him to a place among the great poets; but it was the study of his life to refrain his imagination and keep it within the modesty of truth; aspiring no higher than to be a faithful interpreter of nature, waiting for the day when the "Kingdom of Man"[1] should come.

Besides these translations, Bacon once wrote a son-

[1] *Indicia vera de Interpretatione Naturæ, sive de* Regno Hominis. Title of the *Novum Organum*.

net: but we know no more about it than that it was meant in some way or other to assist in sweetening the Queen's temper towards the Earl of Essex: and it has either not been preserved at all, or not so as to be identified. There are also two other poems which have been ascribed to him, whether upon the authority of any one who had means of knowing, I cannot say; but certainly upon external evidence which, in the absence of internal evidence to the contrary, entitles them to a place somewhere in this edition: and there can be no place fitter than this.

The first is to be found in a volume of manuscript collections now in the British Museum (Bibl. Regia, 17. B. L.); but the hand is that of a copyist, and tells us only that *somebody* had said or thought that the verses were by Bacon: — a fact however which is worth rather more in this case than in many others; inasmuch as (verses being out of Bacon's line) a man merely guessing at the author is not likely to have thought of him. The internal evidence tells for little either way. They are such lines as might very well have been written by Bacon, or by a hundred other people.

VERSES MADE BY MR. FRANCIS BACON.

The man of life upright, whose guiltless heart is free
From all dishonest deeds and thoughts of vanity:
The man whose silent days in harmless joys are spent,
Whom hopes cannot delude, nor fortune discontent;
That man needs neither towers nor armour for defence,
Nor secret vaults to fly from thunder's violence:
He only can behold with unaffrighted eyes
The horrors of the deep and terrors of the skies;

Thus scorning all the care that Fate or Fortune brings,
He makes the Heaven his book, his wisdom heavenly
things;
Good thoughts his only friends, his life a well-spent
age,
The earth his sober inn, — a quiet pilgrimage.

The other is a more remarkable performance; and is ascribed to Bacon on the authority of Thomas Farnaby, a contemporary and a scholar. It is a paraphrase of a Greek epigram, attributed by some to Poseidippus, by others to Plato the Comic poet, and by others to Crates the Cynic. In 1629, only three years after Bacon's death, Farnaby published a collection of Greek Epigrams under the title Ἡ τῆς ἀνθολογίας Ἀνθολογία: *Florilegium Epigrammatum Græcorum, eorumque Latino versu a variis redditorum.* After giving the epigram in question, with its Latin translation on the opposite page, he adds — *Huc elegantem V. C. L. Domini Verulamii παρῳδίαν adjicere adlubuit;* and then prints the English lines below (the only English in the book); with a translation of his own opposite, in rhyming Greek. A copy of the English lines was also found among Sir Henry Wotton's papers, with the name *Francis Lord Bacon* at the bottom;[1] — a fact which would be of weight, if one could infer from it that Wotton believed them to be genuine; for he was a man likely enough to know. This, however, would be too much to infer from the mere circumstance that the paper had been in Wotton's possession, for it may have been sent to him by a correspondent, he knowing nothing about it: and as the case stands, he is not sufficiently connected with

[1] See Reliquiæ Wottonianæ, p. 513.

it to be cited as a witness. But on the other hand Farnaby's evidence is direct and strong. He speaks as if there were no doubt about the fact; nor has there ever, I believe, been a rival claim put in for any body else. So that unless the supposition involves some improbability (and I do not myself see any), the natural conclusion is that the lines were really written by Bacon. And when I compare them with his translations of the 90th and 137th psalms, the metre of which, though not the same, has a kind of resemblance which makes the comparison more easy, — especially in the rhymed couplet which closes each stanza, — I should myself say that the internal evidence is in favour of their being by the same hand.

The original (the text of which I take from Wellesley's *Anthologia Polyglotta*) runs thus:

ΠΟΣΕΙΔΙΠΠΟΥ, *οἱ δὲ* ΠΛΑΤΩΝΟΣ ΚΩΜΙΚΟΥ.

*Ποίην τις βιότοιο τάμοι τρίβον; εἰν ἀγορῇ μὲν*
*Νείκεα καὶ χαλεπαὶ πρήξιες · ἐν δὲ δόμοις*
*Φροντίδες · ἐν δ' ἀγροῖς καμάτων ἅλις · ἐν δὲ θαλάσσῃ*
*Τάρβος · ἐπὶ ξείνης δ', ἢν μὲν ἔχῃς τι, δέος ·*
*Ἢν δ' ἀπορῇς, ἀνιηρόν. ἔχεις γάμον; οὐκ ἀμέρμνος*
*Ἔσσεαι · οὐ γαμέεις; ζῇς ἐτ' ἐρημότερος.*
*Τέκνα πόνοι · πήρωσις ἅπαις βίος · αἱ νεότητες*
*Ἄφρονες · αἱ πολιαὶ δ' ἔμπαλιν ἀδρανέες.*
*Ἢν ἄρα τοῖνδε δυοῖν ἑνὸς αἵρεσις, ἢ τὸ γενέσθαι*
*Μηδέποτ', ἢ τὸ θανεῖν αὐτίκα τικτόμενον.*

The English lines which follow (described as "Lord Verulam's elegant *παρῳδία*") are not meant for a translation, and can hardly be called a paraphrase. They are rather another poem on the same subject and with the same sentiment; and though the topics are mostly the same, the treatment of them is very different. The

merit of the original consists almost entirely in its compactness; there being no special felicity in the expression, or music in the metre.[1] In the English, compactness is not aimed at, and a tone of plaintive melody is imparted, which is due chiefly to the metrical arrangement, and has something very pathetic in it to my ear.

The world's a bubble, and the life of man
less than a span;
In his conception wretched, from the womb
so to the tomb:
Curst from the cradle, and brought up to years
with cares and fears.
Who then to frail mortality shall trust,
But limns the water, or but writes in dust.

Yet since with sorrow here we live oppress,
what life is best?
Courts are but only superficial schools
to dandle fools.
The rural parts are turned into a den
of savage men.
And where's the city from all vice so free,
But may be term'd the worst of all the three?

[1] So little does the effect depend upon the metre, that a fair enough idea may be conveyed of it in English blank verse, which can follow the words more closely than rhyme.

What life shall a man choose? In court and mart
Are quarrels and hard dealing; cares at home;
Labours by land; terrors at sea; abroad,
Either the fear of losing what thou hast,
Or worse, nought left to lose; if wedded, much
Discomfort; comfortless unwed; a life
With children troubled, incomplete without:
Youth foolish, age outworn. Of these two choose then;
Or never to be born, or straight to die.

Domestic cares afflict the husband's bed,
or pains his head.
Those that live single take it for a curse,
or do things worse.
Some would have children; those that have them moan,
or wish them gone.
What is it then to have or have no wife,
But single thraldom, or a double strife?

Our own affections still at home to please
is a disease:
To cross the seas to any foreign soil
perils and toil.
Wars with their noise affright us: when they cease,
we are worse in peace.
What then remains, but that we still should cry
Not to be born, or being born to die.

# TRANSLATION

OF

# CERTAINE PSALMES

INTO

# ENGLISH VERSE.

BY

THE RIGHT HONOURABLE

FRANCIS LO. VERULAM, VISCOUNT ST. ALBAN.

LONDON:

Printed for Hanna Barret, and Richard Whittaker; and are to be sold at the signe of the King's Head in Paul's Church Yard.

1625.

TO HIS VERY GOOD FRIEND

## MR. GEORGE HERBERT.

THE pains that it pleased you to take about some of my writings I cannot forget; which did put me in mind to dedicate to you this poor exercise of my sickness. Besides, it being my manner for dedications, to choose those that I hold most fit for the argument, I thought that in respect of divinity and poesy met, (whereof the one is the matter, the other the stile of this little writing,) I could not make better choice. So, with signification of my love and acknowledgment, I ever rest

Your affectionate Friend,

FR. ST. ALBAN.

A

# TRANSLATION OF CERTAIN PSALMS.

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## THE TRANSLATION OF THE IST PSALM.

WHO never gave to wicked reed
  A yielding and attentive ear;
Who never sinner's paths did tread,
  Nor sat him down in scorner's chair;
But maketh it his whole delight
  On law of God to meditate,
And therein spendeth day and night:
  That man is in a happy state.

He shall be like the fruitful tree,
  Planted along a running spring,
Which, in due season, constantly
  A goodly yield of fruit doth bring:
Whose leaves continue always green,
  And are no prey to winter's pow'r:
So shall that man not once be seen
  Surprised with an evil hour.

With wicked men it is not so,
Their lot is of another kind:
All as the chaff, which to and fro
Is toss'd at mercy of the wind.
And when he shall in judgment plead,
A casting sentence bide he must:
So shall he not lift up his head
In the assembly of the just.

For why? the Lord hath special eye
To be the godly's stay at call:
And hath given over, righteously,
The wicked man to take his fall.

---

## THE TRANSLATION OF THE XIIth PSALM.

Help, Lord, for godly men have took their flight,
And left the earth to be the wicked's den:
Not one that standeth fast to truth and right,
But fears, or seeks to please, the eyes of men.
When one with other falls in talk apart,
Their meaning go'th not with their words, in proof;
But fair they flatter, with a cloven heart,
By pleasing words, to work their own behoof.

But God cut off the lips, that are all set
To trap the harmless soul, that peace hath vow'd;
And pierce the tongues, that seek to counterfeit
The confidence of truth, by lying loud:

Yet so they think to reign, and work their will
By subtile speech, which enters ev'ry where;
And say, Our tongues are ours, to help us still;
What need we any higher pow'r to fear?

Now for the bitter sighing of the poor,
The Lord hath said, I will no more forbear
The wicked's kingdom to invade and scour,
And set at large the men restrain'd in fear.
And sure the word of God is pure and fine,
And in the trial never loseth weight;
Like noble gold, which, since it left the mine,
Hath seven times passed through the fiery strait.

And now thou wilt not first thy word forsake,
Nor yet the righteous man that leans thereto;
But wilt his safe protection undertake,
In spite of all their force and wiles can do.
And time it is, O Lord, thou didst draw nigh;
The wicked daily do enlarge their bands;
And that which makes them follow ill a vie,
Rule is betaken to unworthy hands.

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## THE TRANSLATION OF THE XCTH PSALM.

O Lord, thou art our home, to whom we fly,
And so hast always been from age to age:
Before the hills did intercept the eye,
Or that the frame was up of earthly stage,
One God thou wert, and art, and still shall be;
The line of Time, it doth not measure thee.

Both death and life obey thy holy lore,
And visit in their turns, as they are sent;
A thousand years with thee they are no more
Than yesterday, which, ere it is, is spent:
Or as a watch by night, that course doth keep,
And goes, and comes, unwares to them that sleep.

Thou carriest man away as with a tide:
Then down swim all his thoughts that mounted high:
Much like a mocking dream, that will not bide,
But flies before the sight of waking eye;
Or as the grass, that cannot term obtain
To see the summer come about again.

At morning, fair it musters on the ground;
At even, it is cut down and laid along:
And though it spared were and favour found,
The weather would perform the mower's wrong:
Thus hast thou hang'd our life on brittle pins,
To let us know it will not bear our sins.

Thou buriest not within oblivion's tomb
Our trespasses, but ent'rest them aright;
Ev'n those that are conceiv'd in darkness' womb,
To thee appear as done at broad day-light.
As a tale told, which sometimes men attend,
And sometimes not, our life steals to an end.

The life of man is threescore years and ten,
Or, that if he be strong, perhaps fourscore;
Yet all things are but labour to him then,
New sorrows still come on, pleasures no more.
Why should there be such turmoil and such strife,
To spin in length this feeble line of life?

But who considers duly of thine ire?
Or doth the thoughts thereof wisely embrace?
For thou, O God, art a consuming fire:
Frail man, how can he stand before thy face?
If thy displeasure thou dost not refrain,
A moment brings all back to dust again.

Teach us, O Lord, to number well our days,
Thereby our hearts to wisdom to apply;
For that which guides man best in all his ways,
Is meditation of mortality.
This bubble light, this vapour of our breath,
Teach us to consecrate to hour of death.

Return unto us, Lord, and balance now
With days of joy our days of misery;
Help us right soon, our knees to thee we bow;
Depending wholly on thy clemency;
Then shall thy servants both with heart and voice,
All the days of their life in thee rejoice.

Begin thy work, O Lord, in this our age,
Shew it unto thy servants that now live;
But to our children raise it many a stage,
That all the world to thee may glory give.
Our handy-work likewise, as fruitful tree,
Let it, O Lord, blessed, not blasted be.

## THE TRANSLATION OF THE CIVTH PSALM.

FATHER and King of pow'rs, both high and low,
Whose sounding fame all creatures serve to blow;
My soul shall with the rest strike up thy praise,
And carol of thy works and wondrous ways.
But who can blaze thy beauties, Lord, aright?
They turn the brittle beams of mortal sight.
Upon thy head thou wear'st a glorious crown,
All set with virtues, polish'd with renown:
Thence round about a silver veil doth fall
Of crystal light, mother of colours all.
The compass heaven, smooth without grain or fold,
All set with spangs of glitt'ring stars untold,
And strip'd with golden beams of power unpent,
Is raised up for a removing tent.
Vaulted and arched are his chamber beams
Upon the seas, the waters, and the streams:
The clouds as chariots swift do scour the sky;
The stormy winds upon their wings do fly.
His angels spirits are, that wait his will,
As flames of fire his anger they fulfil.
In the beginning, with a mighty hand,
He made the earth by counterpoise to stand;
Never to move, but to be fixed still;
Yet hath no pillars but his sacred will.
This earth, as with a veil, once cover'd was,
The waters over-flowed all the mass:
But upon his rebuke away they fled,
And then the hills began to shew their head;
The vales their hollow bosoms open'd plain,

The streams ran trembling down the vales again:
And that the earth no more might drowned be,
He set the sea his bounds of liberty;
And though his waves resound, and beat the shore,
Yet it is bridled by his holy lore.
Then did the rivers seek their proper places,
And found their heads, their issues, and their races;
The springs do feed the rivers all the way,
And so the tribute to the sea repay:
Running along through many a pleasant field,
Much fruitfulness unto the earth they yield:
That know the beasts and cattle feeding by,
Which for to slake their thirst do thither hie.
Nay desert grounds the streams do not forsake,
But through the unknown ways their journey take:
The asses wild, that hide in wilderness,
Do thither come, their thirst for to refresh.
The shady trees along their banks do spring,
In which the birds do build, and sit, and sing;
Stroking the gentle air with pleasant notes,
Plaining or chirping through their warbling throats.
The higher grounds, where waters cannot rise,
By rain and dews are water'd from the skies;
Causing the earth put forth the grass for beasts,
And garden herbs, serv'd at the greatest feasts;
And bread, that is all viands' firmament,
And gives a firm and solid nourishment;
And wine, man's spirits for to recreate;
And oil, his face for to exhilarate.
The sappy cedars, tall like stately tow'rs,
High-flying birds do harbour in their bow'rs:
The holy storks, that are the travellers,
Choose for to dwell and build within the firs;

The climbing goats hang on steep mountain's side;
The digging conies in the rocks do bide.
The moon, so constant in inconstancy,
Doth rule the monthly seasons orderly;
The sun, eye of the world, doth know his race,
And when to shew, and when to hide his face.
Thou makest darkness, that it may be night,
When as the savage beasts, that fly the light,
(As conscious of man's hatred) leave their den,
And range abroad, secur'd from sight of men.
Then do the forests ring of lions roaring,
That ask their meat of God, their strength restoring;
But when the day appears, they back do fly,
And in their dens again do lurking lie.
Then man goes forth to labour in the field,
Whereby his grounds more rich increase may yield.
O Lord, thy providence sufficeth all;
Thy goodness, not restrained, but general
Over thy creatures: the whole earth doth flow
With thy great largeness pour'd forth here below.
Nor is it earth alone exalts thy name,
But seas and streams likewise do spread the same.
The rolling seas unto the lot doth fall
Of beasts innumerable, great and small;
There do the stately ships plough up the floods,
The greater navies look like walking woods;
The fishes there far voyages do make,
To divers shores their journey they do take.
There hast thou set the great Leviathan,
That makes the seas to seeth like boiling pan.
All these do ask of thee their meat to live,
Which in due season thou to them dost give.
Ope thou thy hand, and then they have good fare;

Shut thou thy hand, and then they troubled are.
All life and spirit from thy breath proceed,
Thy word doth all things generate and feed.
If thou withdraw'st it, then they cease to be,
And straight return to dust and vanity;
But when thy breath thou dost send forth again,
Then all things do renew and spring amain;
So that the earth, but lately desolate,
Doth now return unto the former state.
The glorious majesty of God above
Shall ever reign in mercy and in love:
God shall rejoice all his fair works to see,
For as they come from him all perfect be.
The earth shall quake, if aught his wrath provoke;
Let him but touch the mountains, they shall smoke.
As long as life doth last I hymns will sing,
With cheerful voice, to the eternal King;
As long as I have being, I will praise
The works of God, and all his wondrous ways.
I know that he my words will not despise,
Thanksgiving is to him a sacrifice.
But as for sinners, they shall be destroy'd
From off the earth; their places shall be void.
Let all his works praise him with one accord;
O praise the Lord, my soul; praise ye the Lord!

## THE TRANSLATION OF THE CXXVITH PSALM.

WHEN God return'd us graciously
Unto our native land,
We seem'd as in a dream to be,
And in a maze to stand.

The heathen likewise they could say:
The God, that these men serve,
Hath done great things for them this day,
Their nation to preserve.

'Tis true, God hath pour'd out his grace
On us abundantly;
For which we yield him psalms and praise,
And thanks with jubilee.

O Lord, turn our captivity,
As winds, that blow at south,
Do pour the tides with violence
Back to the river's mouth.

Who sows in tears shall reap in joy,
The Lord doth so ordain;
So that his seed be pure and good,
His harvest shall be gain.

## THE TRANSLATION OF THE CXXXVIITH PSALM.

When as we sat all sad and desolate,
By Babylon upon the river's side,
Eas'd from the tasks which in our captive state
We were enforced daily to abide,
Our harps we had brought with us to the field,
Some solace to our heavy souls to yield.

But soon we found we fail'd of our account,
For when our minds some freedom did obtain,
Straightways the memory of Sion Mount
Did cause afresh our wounds to bleed again;
So that with present griefs, and future fears,
Our eyes burst forth into a stream of tears.

As for our harps, since sorrow struck them dumb,
We hang'd them on the willow-trees were near;
Yet did our cruel masters to us come,
Asking of us some Hebrew songs to hear:
Taunting us rather in our misery,
Than much delighting in our melody.

Alas (said we) who can once force or frame
His grieved and oppressed heart to sing
The praises of Jehovah's glorious name,
In banishment, under a foreign king?
In Sion is his seat and dwelling place,
Thence doth he shew the brightness of his face.

Hierusalem, where God his throne hath set,
Shall any hour absent thee from my mind?

Then let my right hand quite her skill forget,
Then let my voice and words no passage find;
Nay, if I do not thee prefer in all,
That in the compass of my thoughts can fall.

Remember thou, O Lord, the cruel cry
Of Edom's children, which did ring and sound,
Inciting the Chaldean's cruelty,
"Down with it, down with it, even unto the ground."
In that good day repay it unto them,
When thou shalt visit thy Hierusalem.

And thou, O Babylon, shalt have thy turn
By just revenge, and happy shall he be,
That thy proud walls and tow'rs shall waste and burn,
And as thou didst by us, so do by thee.
Yea, happy he, that takes thy children's bones,
And dasheth them against the pavement stones.

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## THE TRANSLATION OF THE CXLIXTH PSALM.

O SING a new song to our God above;
Avoid profane ones, 'tis for holy quire:
Let Israel sing songs of holy love
To him that made them, with their hearts on fire:
Let Sion's sons lift up their voice, and sing
Carols and anthems to their heavenly King.

Let not your voice alone his praise forth tell,
But move withal and praise him in the dance;

Cymbals and harps let them be tuned well:
'Tis he that doth the poor's estate advance:
Do this not only on the solemn days,
But on your secret beds your spirits raise.

O let the saints bear in their mouth his praise;
And a two-edged sword drawn in their hand;
Therewith for to revenge the former days
Upon all nations that their zeal withstand;
To bind their kings in chains of iron strong,
And manacle their nobles for their wrong.

Expect the time, for 'tis decreed in Heaven,
Such honour shall unto his saints be given.

FINIS.

# APPENDIX.

# CHRISTIAN PARADOXES.

## PREFACE.

*The Character of a believing Christian in paradoxes and seeming contradictions* is said to have appeared first in 1643, as a separate pamphlet, under Bacon's name;[1] and in 1648 it was inserted in the *Remains;* upon the authority no doubt of that pamphlet; which is therefore the sole authority on which it is ascribed to Bacon, and amounts in effect to no more than this — that within seven years after his death *somebody* had either thought it was his, or thought that it might be plausibly attributed to him, and that his name on the title-page would help the sale.

Rawley says nothing of it: and as he can hardly be supposed to have overlooked it in the collection, his silence must be understood as equivalent to a statement that it was one of the many "pamphlets put forth under his lordship's name," which "are not to be owned for his."[2] Tenison says nothing about it. No traces of it, or of any part of it, or of anything at all resembling it, are to be found among the innumerable Baconian manuscripts, fair and foul, — fragments, rough notes, discarded beginnings, loose leaves, — which may still be seen at Lambeth, in the British Museum, and

[1] Rémusat, p. 150. note.

[2] Resuscitatio, at the end.

in other repositories. So far as I know, if the publisher of the edition of 1643 had not put Bacon's name upon the titlepage, there would have been no reason at all for thinking that he had anything to do with it; and as it is, the reason is so slight, that if the probabilities were otherwise balanced, it would hardly turn the scale. The name on the titlepage of such a publication is enough to suggest and justify the inquiry *whether* there be any evidence, internal or external, to confirm the statement; but can scarcely be taken for evidence in itself, even in the absence of evidence the other way.

In the opinions and sentiments which the work implies, there is nothing from which I should infer either that it was not Bacon's or that it was. It is the work of an orthodox Churchman of the early part of the 17th century, who fully and unreservedly accepting on the authority of revelation the entire scheme of Christian theology, and believing that the province of faith is altogether distinct from that of reason, found a pleasure in bringing his spiritual loyalty into stronger relief by confronting and numbering up the intellectual paradoxes which it involved. In these days of uncertain faith it has indeed been mistaken for sarcastic, but I can have no doubt whatever that it was written (whoever wrote it) in the true spirit of the *Credo quia impossibile*, and not only in perfect sincerity, but also in profound security of conviction. One might as well suppose that the Athanasian Creed was written in derision of the particular doctrine of the Trinity, as that this was written in derision of the doctrines of the Christian Church in general.

As far as the opinions are concerned therefore, it might well enough have been written by Bacon: for we know that he did earnestly believe and continually insist upon the necessity of keeping the domains of Reason and Faith distinct. "As it was aptly said by one of Plato's school *the sense of man resembles the sun, which openeth and revealeth the terrestrial globe, but obscureth and concealeth the celestial;* so doth the sense discover natural things, but darken and shut up divine. . . . Therefore attend his will as himself openeth it, and give unto faith that which unto faith belongeth; for *more worthy is it to believe than to think or know*, considering that in knowledge (as we now are capable of it) the mind suffereth from inferior natures; *but in all belief it suffereth from a spirit which it holdeth superior and more authorised than itself.*"[1] A dozen passages might be quoted of the same tenor. Upon which principle, to enumerate the points in which the instinct of belief, resting on that higher authority, overrules the instincts of the understanding, is to celebrate the triumph of the worthiest part of man's nature. And this, I have no doubt, is what the writer of these "Christian Paradoxes" thought he was doing.

Turning however from the subject and substance to the *style*, the evidence appears to me to be decidedly against the supposition that Bacon was the writer. It is impossible indeed to say that, among the thousand moods and humours which such a mind must have passed through, the whim of trying such a piece of intellectual ingenuity as this could never on any occasion have seized it. But I think I may say that in

[1] Valerius Terminus of the Interpretation of Nature, cap. 1.

the whole compass of his writings, — early and late, serious and playful, argumentative, rhetorical, devotional, official, familiar, public and private, — there is not one to be found which at all resembles it. As this however is a point which hardly admits of proof or disproof, I must be content with stating my own opinion that the composition has none of the marks of Bacon's manner, but a manner of its own essentially unlike his; and producing in evidence the thing itself. And with this I conclude the collection of Literary Works.

THE

# CHARACTERS OF A BELIEVING CHRISTIAN,

IN PARADOXES AND SEEMING CONTRADICTIONS.[1]

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I.

A CHRISTIAN is one that believes things his reason cannot comprehend; he hopes for things which neither he nor any man alive ever saw: he labours for that which he knoweth he shall never obtain; yet, in the issue, his belief appears not to be false; his hope makes him not ashamed; his labour is not in vain.

II.

He believes three to be one, and one to be three; a father not to be elder than his son; a son to be equal with his father; and one proceeding from both to be equal with both; he believes three persons in one nature, and two natures in one person.

III.

He believes a virgin to be a mother of a son; and

[1] Remains, p. 88. Several corrections have been introduced into the text by one of the modern editors, apparently from some better copy; which I have therefore adopted.

that very son of her's to be her maker. He believes him to have been shut up in a narrow room, whom heaven and earth could not contain. He believes him to have been born in time, who was and is from everlasting. He believes him to have been a weak child, carried in arms, who is the Almighty; and him once to have died, who only hath life and immortality in himself.

IV.

He believes the God of all grace to have been angry with one that hath never offended him; and that God, that hates sin, to be reconciled to himself, though sinning continually, and never making, or being able to make him satisfaction. He believes a most just God to have punished a most just person, and to have justified himself though a most ungodly sinner. He believes himself freely pardoned, and yet a sufficient satisfaction was made for him.

V.

He believes himself to be precious in God's sight, and yet loathes himself in his own. He dares not justify himself even in those things wherein he can find no fault with himself, and yet believes God accepts him in those services wherein he is able to find many faults.

VI.

He praises God for his justice, and yet fears him for his mercy. He is so ashamed as that he dares not open his mouth before God; and yet he comes with boldness to God, and asks him anything he needs. He is so humble as to acknowledge himself to deserve nothing but evil; and yet believes that God means

him all good. He is one that fears always, yet is as bold as a lion. He is often sorrowful, yet always rejoicing; many times complaining, yet always giving of thanks. He is the most lowly-minded, yet the greatest aspirer; most contented, yet ever craving.

VII.

He bears a lofty spirit in a mean condition; when he is ablest, he thinks meanest of himself. He is rich in poverty, and poor in the midst of riches. He believes all the world to be his, yet he dares take nothing without special leave from God. He covenants with God for nothing, yet looks for a great reward. He loseth his life and gains by it; and whilst he loseth it, he saveth it.

VIII.

He lives not to himself, yet of all others he is most wise for himself. He denieth himself often, yet no man loveth himself so well as he. He is most reproached, yet most honoured. He hath most afflictions, and most comforts.

IX.

The more injury his enemies do him, the more advantages he gains by them. The more he forsakes worldly things, the more he enjoys them.

X.

He is the most temperate of all men, yet fares most deliciously; he lends and gives most freely, yet he is the greatest usurer; he is meek towards all men, yet inexorable by men. He is the best child, husband, brother, friend; yet hates father and mother, brother

and sister. He loves all men as himself, yet hates some men with a perfect hatred.

XI.

He desires to have more grace than any man hath in the world, yet is truly sorrowful when he seeth any man have less than himself; he knoweth no man after the flesh, yet gives all men their due respects; he knoweth if he please man he cannot be the servant of Christ; yet for Christ's sake he pleaseth all men in all things. He is a peace-maker, yet is continually fighting, and an irreconcileable enemy.

XII.

He believes him to be worse than an infidel that provides not for his family, yet himself lives and dies without care. He accounts all his superiors, yet stands stiffly upon authority. He is severe to his children, because he loveth them; and by being favourable unto his enemy, he revengeth himself upon him.

XIII.

He believes the angels to be more excellent creatures than himself, and yet accounts them his servants. He believes that he receives many good things by their means, and yet he neither prays for their assistance, nor offers them thanks, which he doth not disdain to do to the meanest Christian.

XIV.

He believes himself to be a king, how mean soever he be: and how great soever he be, he thinks himself not too good to be a servant to the poorest saint.

XV.

He is often in prison, yet always at liberty; a free-man, though a servant. He loves not honour amongst men, yet highly prizeth a good name.

XVI.

He believes that God hath bidden every man that doth him good to do so; he yet of any man is the most thankful to them that do aught for him. He would lay down his life to save the soul of his enemy, yet will not adventure upon one sin to save the life of him who saved his.

XVII.

He swears to his own hindrance, and changeth not; yet knoweth that his oath cannot tie him to sin.

XVIII.

He believes Christ to have no need of anything he doth, yet maketh account that he doth relieve Christ in all his acts of charity. He knoweth he can do nothing of himself, yet labours to work out his own salvation. He professeth he can do nothing, yet as truly professeth he can do all things: he knoweth that flesh and blood cannot inherit the kingdom of God, yet believeth he shall go to heaven both body and soul.

XIX.

He trembles at God's word, yet counts it sweeter to him than honey and the honey-comb, and dearer than thousands of gold and silver.

XX.

He believes that God will never damn him, and yet fears God for being able to cast him into hell. He knoweth he shall not be saved by nor for his good works, yet he doth all the good works he can.

XXI.

He knoweth God's providence is in all things, yet is so diligent in his calling and business, as if he were to cut out the thread of his happiness. He believes before-hand that God hath purposed what he shall be, and that nothing can make him to alter his purpose; yet prays and endeavours, as if he would force God to save him for ever.

XXII.

He prays and labours for that which he is confident God means to give; and the more assured he is, the more earnest he prays for that he knows he shall never obtain, and yet gives not over. He prays and labours for that which he knows he shall be no less happy without; he prays with all his heart not to be led into temptation, yet rejoiceth when he is fallen into it; he believes his prayers are heard, even when they are denied, and gives thanks for that which he prays against.

XXIII.

He hath within him both flesh and spirit, yet he is not a double-minded man; he is often led captive by the law of sin, yet it never gets dominion over him; he cannot sin, yet can do nothing without sin.

He doth nothing against his will, yet maintains he doth what he would not. He wavers and doubteth, yet obtains.

XXIV.

He is often tossed and shaken, yet is as mount Sion; he is a serpent and a dove; a lamb and a lion; a reed and a cedar. He is sometimes so troubled, that he thinks nothing to be true in religion; yet if he did think so, he could not at all be troubled. He thinks sometimes that God hath no mercy for him, yet resolves to die in the pursuit of it. He believes, like Abraham, against hope, and though he cannot answer God's logic, yet, with the woman of Canaan, he hopes to prevail with the rhetoric of importunity.

XXV.

He wrestles, and yet prevails; and though yielding himself unworthy of the least blessing he enjoys, yet, Jacob-like, he will not let him go without a new blessing. He sometimes thinks himself to have no grace at all, and yet how poor and afflicted soever he be besides, he would not change conditions with the most prosperous man under heaven, that is a manifest worldling.

XXVI.

He thinks sometimes that the ordinances of God do him no good, yet he would rather part with his life than be deprived of them.

XXVII.

He was born dead; yet so that it had been murder for any to have taken his life away. After he began to live, he was ever dying.

XXVIII.

And though he hath an eternal life begun in him, yet he makes account he hath a death to pass through.

XXIX.

He counts self-murder a heinous sin, yet is ever busied in crucifying the flesh, and in putting to death his earthly members; not doubting but there will come a time of glory, when he shall be esteemed precious in the sight of the great God of heaven and earth, appearing with boldness at his throne, and asking anything he needs, being endued with humility, by acknowledging his great crimes and offences, and that he deserveth nothing but severe punishment.

XXX.

He believes his soul and body shall be as full of glory as them that have more; and no more full than theirs that have less.

XXXI.

He lives invisible to those that see him, and those that know him best do but guess at him; yet those many times judge more truly of him than he doth of himself.

XXXII.

The world will sometimes account him a saint, when God accounteth him a hypocrite; and afterwards, when the world branded him for an hypocrite, then God owned him for a saint.

XXXIII.

His death makes not an end of him. His soul which was put into his body, is not to be perfected without his body; yet his soul is more happy when it is separated from his body, than when it was joined unto it: And his body, though torn in pieces, burnt to ashes, ground to powder, turned to rottenness, shall be no loser.

XXXIV.

His Advocate, his Surety shall be his Judge; his mortal part shall become immortal; and what was sown in corruption and defilement shall be raised in incorruption and glory; and a finite creature shall possess an infinite happiness. Glory be to God.

END OF THE LITERARY WORKS.

# PROFESSIONAL WORKS.

# GENERAL PREFACE.

THE most important difference between this edition of Bacon's Professional Works and its predecessors results from a careful collation of all accessible MSS., which, with the occasional correction of obvious blunders, has, I believe, made many passages of the text intelligible for the first time.

It will be found also to differ from the common editions by the addition of two Legal Arguments, one of which has been before published in the *Collectanea Juridica*, and of a paper on Bridewell Hospital, which has been printed in the Reports of the Charities Commission; and by some minor variations in the miscellaneous part of the collection.

The preface to each piece gives such information as I have been able to gather tending to elucidate its history and purport; and I have added notes (more freely than I originally intended), most often where former commentators, in MS. or in print, had suggested questions, but sometimes on difficulties which have occurred to myself.

More than this did not seem to be required, and indeed would scarcely have been justifiable in an edition of Bacon's collected Works, when we look to the character of these professional pieces and consider the very

subordinate position they occupy in the history of his own literary activity, and the comparatively small influence which, on that if on no other account, they can be supposed to have exercised on the progress of English Law.

None of them were published in Bacon's lifetime. Four *Arguments of Law*, with a dedicatory preface, were prepared by him for publication, — apparently as part of a larger collection, — during the period when he was Solicitor and Attorney General, professedly as specimens of forensic eloquence, and mainly, one may suppose, with a view to establishing or enhancing his own professional reputation. His rapid rise and other avocations may account for the design having been dropt; and at all events we have no evidence that it was actively pursued after 1616. The argument for the *Postnati*, and some papers relating to the Union, were also corrected by him; but, whether intended for publication or not, they seem to have been collected with a view to furthering that great design of State rather than with any permanent literary purpose.

None of the other works come to us direct from Bacon's hand. Their importance and claims to be considered authentic are various.

The *Use of the Law* appears to me to possess no value, antiquarian or other, at the present day; and in my preface to it I have given my reasons for believing it to be spurious.

There is some obscurity about the date, as a whole, and the dress, of the *Maxims of the Law*, which I have noticed in the preface; but any how, besides its intrinsic merits, it is all that we have, and must be taken as the representative, of a work by which Bacon hoped to

obtain reputation as a lawyer rivalling with Coke,[1] and which from 1596 to the close of his life he was offering as his own contribution towards that great Instauration of the English Laws, the promotion and direction of which would seem to have been, next to that other Instauration of Natural Science, the most persistent of his nobler aims.

That other scheme, even as an exposition of principles, remained a fragment, and was to a great extent abortive (as I think Mr. Ellis has made it clear), partly because it was premature and based on a misconception and underrating of the conditions and difficulties of the problem, and partly from an inaptitude in Bacon for accurate experimental research. His failure in Law Reform does not appear to me traceable to any similar cause. A Digest of English Law on the principles laid down in the 8th Book *De Augmentis* and in the *Proposal for Amending the Laws* is surely conceivable even now, and would seem the very work for which the times between the middle of Elizabeth's reign and the end of James's were specially fitted. The Year Books were closed and roughly digested by Fitzherbert and Brooke, and the statute laws lay within very manageable compass. Historically, all authoritative maxims of Law were to be extracted from these definite materials; and the theoretical principles necessary for reconciling what was inconsistent and modifying what seemed absurd or unsuitable to the times were equally ready at hand in the Civil Law. There was no lack of men fit to form a gook working staff, sages of the English Law never surpassed at home, or learned civilians abroad.

Nor was there any task for which Bacon would seem

[1] *Proposal for amending the Laws of England.*

to have been intellectually better fitted than the superintendence of such a work. It is for his biographer and the historian of these reigns to explain why nothing was done; but the fact that the work is still almost untouched seems to show that the causes lie deeper in the structure of our society than can be laid exclusively to the account of those times or persons.

Although I believe the fragment of the *Maxims* which we have was all written by about 1597, yet I see no reason for doubting that it represents adequately enough in point of workmanship that auxiliary Treatise *De Diversis Regulis Juris*, the nature and purpose of which is given in the 82nd and following aphorisms of the 8th Book *De Augmentis*.[1] But the question how far he had succeeded, or how near he would with encouragement have attained to the completion of his design, must remain unsolved; and I suppose no one will be found to take it up again. It was no less than to extract from the whole body of decided cases, so far as such materials would admit it, the common Rules and Maxims of justice by which they are related to each other, with their limitations and exceptions, exemplified by a sufficient collection of examples. Besides the dangers of fanciful analogies, and the difficulty in many cases of ascertaining the true *ratio decidendi*, it is obvious that the number of accidental or really anomalous decisions would be very great; and indeed one use of the work would have been to point them out for correction, if need were, and avoidance as precedents in new cases. Bacon was fully aware of this, and warns us in his preface that "in some few cases" of his specimen "he did intend expressly to weigh down the authority

[1] Vol. III.

by evidence of reason," and in fact "to correct the law."[1] This is a matter to be borne in mind, if any lawyer should think it worth while to examine the examples in detail with the authorities.

The *Reading on the Statute of Uses* has perhaps received more attention than the *Maxims*. It has always been cited with respect, and was edited in 1804, with notes far exceeding the text in length, by Mr. Rowe. It is however only a fragment of a course which Bacon was called upon to give in Gray's Inn as Double Reader in 1600. It is not mentioned in a list of MS. works on Professional Subjects,[2] which he made

[1] I believe he might have added that in many more cases he has attempted, as it were, to infuse a rational principle into decisions made at haphazard or on accidental grounds.

[2] "July 25. 1608.

*Continuatur series librorum cartaceorum.*

Libri professoris: vt. of the Laws of England.

1. Regulæ Juris cum limitationibus et casibus. This is merely a composition of mine own, and not a note-book.
2. Patrocinia et actiones causarum. Arguments in law by me made. This is also a composition; being a book of pleadings; such as Marions in French.
3. Observationes et commentationes in Jure, ex conceptu proprio sparsim intratæ.
4. Observationes et annotationes in Jure, ex libris et Authoribus Juris sparsim intratæ.
5. Digesta in Jure; hoc est, annotationes tam ex conceptu proprio quam ex Authoribus Juris ordinatæ per titulos. A mere commonplace book of Law.
6. Exempla Majorum in Jure: containing precedents and usages and courses of Courts, and other matter of experience.
7. Lecta sive specialia in Jure; being notes and conceits of principal use, and entered with choice, both for mine own help, and hereafter per case to publish.
8. Diarium fori. The book I have with me to the Courts, to receive such remembrances as fall out upon that I hear there.
9. Vulgaria in Jure; being the ordinary matters, rules and cases admitted for law; to take away shew of being imperfect or unready in common matters; together with some abridgement of special cases for mine own memory, and all other points for shew and credit of readiness and reading.

in 1608; and we do not know to whom we owe the preservation of what we now have, nor whether the rest of the course was ever extant in writing. It may have been delivered *viva voce* or from rough notes; nor would it be inconsistent with the common practice, as shown by the extant records of Gray's Inn, to conjecture that the course may never have been finished. It is however to be observed that the MSS. I have collated, besides breaking off at different points, vary in phraseology in a way hardly to be accounted for but upon the supposition that Bacon himself must have revised the text at least once.

The remainder, besides the additional pieces above mentioned, contains the *Ordinances in Chancery*, in which we may trace with certainty some part to Bacon's own hand, though the main body must be supposed to have previously existed in some shape or other, written or unwritten; and some miscellaneous matter which has been found by collectors and attributed to Bacon, but of which every one is at liberty to form his own judgment from internal evidence, and which I reprint (most of it) only because it has been heretofore printed. The original of this part of the collection, so far as it is genuine, was, I suppose, to be found in the common-place books of various kinds which Bacon kept and has catalogued in the *Commentarius Solutus;* some of them, it is to be observed, containing notes of his own, and some, extracts from other

Libri concernentes Servitium Regis 4.
Lib. servitii reg. in Parlamento.
Lib. servit. reg. quoad reventiones et Commodum.
Lib. servitii regis quoad causas Justitiæ et forenses.
Lib. servit. reg. quoad causas status."
*Commentarius Solutus* (the whole of which will be printed in its place among the Occasional Works).

writers. Some pages, it will be seen, have been thus taken and adapted, whether by Bacon or another, from a treatise by Sir John Doderidge, and I think the case must be the same with other fragments.

Besides the works here printed there are some others extant. Mr. Spedding found in the British Museum, Harl. MSS. 7017. No. 43., a MS. in Bacon's hand on the Prerogative. It appeared to me to be merely a common-place book after the fashion of the *Cases of Treason*, &c., setting down the ordinary Common Law Prerogatives, and not to contain anything interesting as regards Bacon's opinions on the Constitution. Mr. Spedding tells me there is in the Cambridge University Library an argument in Law French on the Sutton Hospital Case.[1] The questions in controversy appearing to be of no permanent interest, and Bacon having argued on the losing side with (if Coke is to be trusted) a very weak case, it was not thought worth while to include it in the collection. I have not myself seen it.

There is also in the Stowe Collection, now the property of Lord Ashburnham, a *Reading on Stat. West. 2nd C. 5. On Advowsons.* Bacon's first reading at Gray's Inn was in 1587, not apparently in his regular term, but in the place of a defaulter. If this be the Reading of that period it would be the earliest extant of his legal works. I should have been glad to have been able to see and, if of sufficient importance, to publish it; and I tried, through several channels of communication and by personal application, to obtain access to the collection; but his Lordship's rule requiring an introduction by a personal acquaintance of his

[1] See 10 Rep. 1.

own and of the applicant, being strictly enforced, has proved a bar.

In the same collection is a MS. of the *Reading on the Statute of Uses*, the character and completeness of which I have, for the same reason, had no opportunity of ascertaining. There is also a MS. of the Argument in *Brownlow and Mitchell*. It was from the printed catalogue of the Stowe MSS. that Mr. Spedding first learnt that this Argument was extant, and it was only after our failure to obtain access to it that we discovered it was already in print, — whether from this source or not we have no means of judging.

D. D. HEATH.

# MAXIMS OF THE LAW.

# PREFACE.

I HAVE already observed that it is difficult to account for the shape in which this treatise comes to us, or to fix its date.

The difficulty arises from the Preface, which dwells at length on the reasons which have influenced Bacon to retain Law French as the language of his expositions; whereas what we have is in English, and I think in good Baconian style. It is certain the Preface and Text, as they stand, were never intended to be published together; and the question is, as to the relation between them.

The first edition was in 1630, with the second edition of the *Use of the Law:* a common title, *The Elements of* the *Common Law*, being prefixed, as well as a separate one to each part. The Text agrees pretty closely with that of Harl. MSS. 1783. and with a MS. at Lincoln's Inn, and is reprinted in Mr. Montagu's edition. There are two other MSS. in the Harleian Collection, Nos. 856. and 6688., generally representing the text of the common edition.

The Lincoln's Inn MS. contains only the first paragraph of the Preface, and the 25th Rule is inserted before the 23rd, as it is also in the first edition. The last three Rules are added after a "finis," and in a dif-

ferent hand, in Harl. MSS. 1783.; and though they are all in the index of Harl. MSS. 6688. the text ends with the heading of No. 23. In other respects the differences in these texts are merely verbal and throw no light on the subject I am discussing.[1]

But besides these, there is a MS. in the University Library at Cambridge, bearing the name and date "Thos. Corie, Hosp. Graii, 1630," which differs so widely from the others that I have thought it advisable to give the principal variations in foot-notes, as they show something of the history of the work.

The dedication in the other MSS. and editions bears date Jan$^{y}$ or Jan$^{y}$ 8th, 1596 (i. e. 1596–7). In the Camb. MS. it is merely 1596, i. e. any time between March 25th 1596, and March 24th 1597; and it seems clear, as I have pointed out in a note, that it was an earlier draft, and that shortly after its composition — may we not say after its presentation? — Bacon had the interview or communication with the Queen to which he alludes in the later draft.

In the Camb. MS. there are only 20 Rules, instead of 25; they stand in a different order;[2] and there are in many Rules fewer examples, as well as considerable variations in the phraseology and sense.

My own impression is that the shorter text has been expanded into, and not abridged from, the longer. But it is of more importance to observe that whereas it is clear that Bacon, while at work on either text, had before him cases adjudged as late as 37° Eliz. — i. e.

[1] In Harl. MSS. 6688. there are one or two additional examples given in very slip-slop Anglo-French, which I have not noticed as they may as well be a transcriber's addition as Bacon's own.

[2] Nos. 1 to 20 in the Camb. MS. correspond with Nos. 5, 6, 7, 8, 11, 18, 15, 16, 12, 1, 2, 19, 21, 20, 22, 9, 25, 3, 23, 24, in the text.

1594 and 1595, — I have failed to find any indication in the marginal references, which so abound in some of the MSS. and editions, of any use of later cases.[1] If this be the fact, it seems to me quite conclusive that these English texts belong entirely to a period of Bacon's life contemporary with, or prior to, the date of his Dedication, and are not chance fragments from the larger Collection at which he tells us, when Attorney General, he had recently been and hoped to continue working.[2]

The Preface contains no internal marks to fix its date. Besides the omission of the main part of it in the Lincoln's Inn MS. it may be observed that in the Camb. MS. it appears to be designed to introduce exactly one hundred Rules, instead of the "some few" of the common text.

On the whole, I think the probable solution is, that at an early date in Bacon's law studies he conceived the thought of such a treatise *De Regulis Juris* as he advocates in the *De Augmentis* and in the *Proposals*, and began to work at it "more cursorily,"[3] by noting down Maxims in Latin, and examples in the language in which he found them, not caring "to hunt after words but matter:" that after the Queen's speech and the ensuing debate in the Parliament of 35° Eliz. to which he refers in the Dedication, and in which he took a part, he prepared a careful specimen of the work in English, and may have shown it, with the first Dedication, to the Queen or her ministers: that he

[1] See notes in the 1st and 3rd Rules. The latter may perhaps suggest that the longer text was in hand some time in 1597, or may be 1598.

[2] *Proposals for amending the Laws of England.* See also the list of his law manuscripts in the *Commentarius solutus.*

[3] *Proposal for amending the Laws.*

was encouraged by "that which he was afterwards vouchsafed to understand from Her Majesty," and not only retouched his Dedication but enlarged his specimen: that he may perhaps have written the first paragraph of the Preface, as it appears in the Lincoln's Inn MS., before he altered his plan; but that before he finished the Preface he had changed his mind, and intended to publish in Law French one hundred, if he could arrange so many in a satisfactory state, or at any rate "some few."

Whether the "*Regulæ Juris, cum limitationibus et casibus*," described among his MSS. in 1608[1] as "merely a composition of his own and not a note book," was the work we have, or an ampler collection in another form, I know no means of determining; but for the reasons above given, I conceive we have here no trace of the result of the later labours spoken of in the *Proposals*.

I believe the present text, formed by a free use of all the MSS. and editions, and with scarcely any purely conjectural emendation, will be found much improved. Any such conjectures I have duly noticed, and where a difficulty without a solution has occurred to me I have called attention to it. Where I have made any observation on the law, it has generally been because I found some early annotator (in the first edition or in some MS.) has already put a *query*, but I have not thought it generally necessary to examine doubtful points, especially with the warning Bacon himself gives us that he did not always mean to be bound by authority.

Bacon did not intend to give any references to cases.

[1] *Commentarius solutus.*

Nevertheless, some of them seem manifestly to refer to manuscript authority, giving only the year of Elizabeth's reign, and to have been about contemporaneous with the text.[1] These I have preserved. The references to the Year Books seem to have accumulated under the hands of transcribers, — and very carelessly. I have expunged a great many which seemed to me clearly irrelevant, but do not feel confident that all which I have retained will be found correct or worth consulting.[2] Where I found a reference to Brook or Fitzherbert, I have thought that sufficient and suppressed the Year Book; the abridgments being much the pleasanter references, and giving any reader the opportunity of further investigation if he thinks it worth while.

[1] See note in 1st Rule.

[2] Those in brackets have not been verified.

## TO HER SACRED MAJESTY.

I DO here most humbly present and dedicate to your Majesty a sheaf and cluster of fruit of that good and favourable season, which by the influence of your happy government we enjoy. For if it be true that *silent leges inter arma*, it is also as true, that your Majesty is in a double respect the life of our laws; once, because without your authority they are but *litera mortua;* and again, because you are the life of our peace, without which laws are put to silence. And as the vital spirits do not only maintain and move the body, but also contend to perfect and renew it, so your sacred Majesty, who is *anima legis*, doth not only give unto your laws force and vigour, but also hath been careful of their amendment and reforming. Wherein your Majesty's proceeding may be compared, as in that part of your government, (for if your government be considered in all the parts, it is incomparable,) with the former doings of the most excellent princes that have reigned, who have ever studied to adorn and honour times of peace with the amendment of the policy of their laws.

Of this proceeding in Augustus Cæsar the testimony remaineth:

*Pace data terris, animum ad civilia vertit*
*Jura suum; legesque tulit justissimus auctor.*

Hence was collected the difference between *gesta in armis* and *acta in toga*, whereof he disputeth thus:

*Ecquid est, quod tam propriè dici potest actum ejus qui togatus in republica cum potestate imperioque versatus sit quam lex? quære acta Gracchi: leges Semproniæ proferentur. Quære Syllæ: Corneliæ. Quid? Cn. Pompeii tertius consulatus in quibus actis consistit? nempe in legibus. A Cæsare ipso si quæreres quidnam egisset in urbe et toga: leges multas se responderet, et præclaras tulisse.*

The same desire long after did spring in the emperor Justinian, being rightly called *ultimus Imperatorum Romanorum;* who, having peace in the heart of his empire, and making his wars prosperously in the remote places of his dominions by his lieutenants, chose it for a monument and honour of his government, to revisit the Roman laws, and to reduce them from infinite volumes and much repugnancy into one competent and uniform corps of law. Of which matter himself doth speak gloriously, and yet aptly, calling it *proprium et sanctissimum templum Justitiæ consecratum:* a work of great excellency indeed, as may well appear, in that France, Italy, and Spain, which have long ago shaken off the yoke of the Roman empire, do yet nevertheless continue to use the policy of that law: but more excellent had the work been, save that the more ignorant and obscure time undertook to correct the more learned and flourishing time. To conclude with the domestical example of one of your Majesty's royal ancestors: King Edward I. your Majesty's famous progenitor, and principal lawgiver of our nation, after he had in his younger years given himself satisfaction in the glory of arms,

by the enterprise of the Holy Land, having inward peace, (otherwise than for the invasions which himself made upon Wales and Scotland, parts far distant from the centre of the realm,) he bent himself to endow his state with sundry notable and fundamental laws, upon which the government ever since hath principally rested.[1]

Of these examples, and others the like, two reasons may be given; the one, because that kings, which, either by the moderation of their natures, or the maturity of their years and judgment, do temper their magnanimity with justice, do wisely consider and conceive of the exploits of ambitious wars, as actions rather great than good; and so, distasted with that course of winning honour, they convert their minds rather to do somewhat for the better uniting of human society, than for the dissolving or disturbing of the same. Another reason is, because times of peace, drawing for the most part with them abundance of wealth and fineness of cunning, do draw also, in further consequence, multitude of suits and controversies, and abuses of laws by evasions and devices; which inconveniences in such times growing more general, do more instantly solicit for the amendment of laws to restrain and repress them.

Your Majesty's reign having been blest from the

[1] The Cambridge MS. here adds: — "And lastly, the King Your Majesty's father had this royal design in such regard and so deeply looked into the state of his laws, as it is to be seen that he made more statutes (not speaking of penal laws, but such as were in amendment of the common laws) than all the Kings between him and the same King Edward I. and that specially in the 32nd year of his reign, what time this kingdom flourished in peace."

A less courtly or more mature judgment of Henry VIII.'s merits as a lawgiver is found in the *Offer of a Digest of the Laws of England.*

Highest with inward peace, and falling into an age wherein, if science be increased, conscience is rather decayed; and if men's wits be great, their wills be more great; and wherein also laws are multiplied in number, and slackened in vigour and execution; it was not possible but that not only suits in law should multiply and increase, whereof always a great part are unjust, but also that all the indirect and sinister courses and practices to abuse law and justice should have been much attempted and put in ure: which no doubt had bred greater enormities, had they not, by the royal policy of your Majesty, by the censure and foresight of your Council table and Star-chamber, and by the gravity and integrity of your Benches, been repressed and refrained: for it may be truly observed, that, as concerning frauds in contracts, bargains, and assurances, and abuses of laws by delays, covins, vexations, and corruptions in informers, jurors, ministers of justice, and the like, there have been sundry excellent statutes made in your Majesty's time, more in number, and more politic in provision, than in any your Majesty's predecessors' times.[1]

[2] But I am an unworthy witness to your Majesty of

[1] It may be worth noting that this praise of the Council and Star Chamber are not in the earlier draft. The Camb. MS. in lieu of this whole paragraph commencing "Your Majesty's reign" has: "But your Majesty's time, coming so soon after the reforming of so many imperfections in the common laws as were by the statutes of the King your father removed, needed the less to add further correction to them by way of statutes. It is frauds in contracts, bargains, and assurances, and abuses of laws by delays, covins, vexations and corruptions in informers, jurors, ministers of justice, and the like, which do now most call for redress, wherein there have been sundry excellent statutes" &c.

[2] The variation here in the Camb. MS. seems to fix its date. It has: "Above all the rest, I cannot forget your Majesty's most regal and famous intention, compounded both of justice and clemency, which was published by your Chancellor in full Parliament from your royal mouth in the 35th

a higher intention and project, both by that which was published by your Chancellor in full parliament from your royal mouth, in the five and thirtieth of your happy reign; and much more by that which I have since been vouchsafed to understand from your Majesty, importing a purpose for these many years infused in your Majesty's breast, to enter into a general amendment of the state of your laws, and to reduce them to more brevity and certainty; that the great hollowness and unsafety in assurances of lands and goods may be strengthened; the snaring penalties that lie upon many subjects removed; the execution of many profitable laws revived; the judge better directed in his sentence; the counsellor better warranted in his counsel; the student eased in his reading; the contentious suitor that seeketh but vexation disarmed; and the honest suitor that seeketh but to obtain his right relieved. Which purpose and intention, as it did strike me with great admiration when I heard it, so it must be acknowledged to be one of the most chosen works, of highest

of your happy reign, of purging and removing the multitude of unnecessary penal laws which now lie upon your people as the rain whereof the Psalm speaks, *Pluet super eos laqueos*, to their infinite [interest] and peril, and besides doth breed another inconvenience as ill as the former, in that the cessation and abstinence to execute these unnecessary laws doth mortify the execution of such laws as are wholesome and most meet to be put in execution both for your Majesty's profit and the universal benefit of the realm. Which intention as it was no doubt a precious seed sown in your Majesty's heart by the Divine hand that holdeth it, so I hope in the maturity of your Majesty's own times will come up and bear fruit, being as a tree of *Balsamum* to cure and salve the wounds and dangers of your subjects. Wherefore, observing" &c.

This first draft, therefore, was written when his knowledge of any intended legal reform was confined to the Lord Keeper's speech and the debate (in which he took a part and used some of the same topics which here appear) 35° Elizabeth: the later form belongs to a time when he had personal communications with the Queen or her ministers.

merit and beneficence towards the subject, that ever entered into the mind of any king: greater than we can imagine; because the imperfections and dangers of the laws are covered under the clemency and excellent temper of your Majesty's government. And though there be rare precedents of it in government, as it cometh to pass in things so excellent, (there being no precedent full in view but of Justinian,) yet I must say as Cicero said to Cæsar, *Nihil vulgare te dignum videri potest.* And as it is no doubt a precious seed sown in your Majesty's heart by the hand of God's divine Majesty, so I hope in the maturity of your Majesty's own times it will come up and bear fruit.

But to return thence whither I have been carried; observing in your Majesty upon so notable proofs and grounds this disposition in general of a prudent and royal regard to the amendment of your laws, and having by my private travel collected many of the grounds of the common laws, the better to establish and settle a certain sense of law which doth now too much waver in incertainty, I conceived the nature of the subject, besides my particular obligation, was such, as I ought not to dedicate the same to any other than to your sacred Majesty; both because, though the collection be mine, yet the laws are yours; and because it is your Majesty's reign that hath been as a goodly and seasonable spring weather to the advancing of all excellent arts of peace. And so concluding with a prayer answerable to the present argument, which is, that God will continue your Majesty's reign in a happy and renowned peace, and that he will guide both your policy and arms to purchase the continuance of it

with surety and honour, I most humbly crave pardon, and commend your Majesty to the Divine preservation.[1]

Your Sacred Majesty's most humble
and obeying Subject and Servant,

FRANCIS BACON.

Jany 8th. 1596.

[1] The Camb. MS. ends here with only the date 1596.

# THE PREFACE.

I HOLD every man a debtor to his profession; from the which as men of course do seek to receive countenance and profit, so ought they of duty to endeavour themselves, by way of amends, to be a help and ornament thereunto. This is performed in some degree by the honest and liberal practice of a profession, when men shall carry a respect not to descend into any course that is corrupt and unworthy thereof, and preserve themselves free from the abuses wherewith the same profession is noted to be infected; but much more is this performed if a man be able to visit and strengthen the roots and foundation of the science itself; thereby not only gracing it in reputation and dignity, but also amplifying it in perfection and substance. Having therefore from the beginning come to the study of the laws of this realm with a mind and desire no less (if I could attain unto it) that the same laws should be the better by my industry, than that myself should be the better by the knowledge of them; I do not find that, by mine own travel, without the help of authority, I can in any kind confer so profitable an addition unto that science, as by collecting the rules and grounds dispersed throughout the body of the same laws: for hereby no small light will be given, in new cases and

such wherein there is no direct authority, to sound into the true conceit of law by depth of reason; in cases wherein the authorities do square and vary, to confirm the law, and to make it received one way; and in cases wherein the law is cleared by authority, yet nevertheless to see more profoundly into the reason of such judgments and ruled cases, and thereby to make more use of them for the decision of other cases more doubtful; so that the uncertainty of law, which is the principal and most just challenge that is made to the laws of our nation at this time, will by this new strength laid to the foundation somewhat the more settle and be corrected. Neither will the use hereof be only in deciding of doubts, and helping soundness of judgment, but further in gracing of argument; in correcting unprofitable subtlety, and reducing the same to a more sound and substantial sense of law; in reclaiming vulgar errors, and generally in the amendment in some measure of the very nature and complexion of the whole law. And therefore the conclusions of reason of this kind are worthily and aptly called by a great civilian *legum leges;* for that many *placita legum*, that is, particular and positive learnings of laws, do easily decline from a good temper of justice, if they be not rectified and governed by such rules.[1]

Now for the manner of setting down of them, I have in all points to the best of my understanding and foresight applied myself, not to that which might serve most for the ostentation of mine own wit or knowledge, but to that which may yield most use and profit to the students and professors of our laws.

And therefore, whereas these rules are some of them

[1] The Preface ends here in the Lincoln's Inn MS.

ordinary and vulgar, that now serve but for grounds and plain songs to the more shallow and impertinent sort of arguments; other of them are gathered and extracted out of the harmony and congruity of cases, and are such as the wisest and deepest sort of lawyers have in judgment and use, though they be not able many times to express and set them down: for the former sort, (which a man that should write rather to raise a high opinion of himself than to instruct others would have omitted, as trite and within every man's compass,) yet nevertheless I have not affected to neglect them; but having chosen out of them such as I thought good, I have reduced them to a true application, limiting and defining their bounds, that they may not be run upon at large, but restrained to point of difference. For as, both in the law and other sciences, the handling of questions by common-place, without aim or application, is the weakest; so yet nevertheless many common principles and generalities are not to be contemned, if they be well derived and deduced into particulars, and their limits and exclusions duly assigned.[1] For there be two contrary faults and extremities in the debating and sifting out of the law, which may be best noted in two several manner of arguments: some argue upon general grounds, and come not near the point in question; others, without laying any foundation of a ground or difference or reason, do loosely put cases, which, though they go near the point, yet being put so scattered, prove not; but rather serve to make the law appear more doubtful than to make it more plain.

Secondly, whereas some of these rules have a con-

[1] The Camb. MS. omits this paragraph.

currence with the civil Roman law, and some others a diversity, and many times an opposition; such grounds as are common to our law and theirs I have not affected to disguise into other words than the civilians use, to the end they might seem invented by me, and not borrowed or translated from them: no, but I took hold of it as matter of great authority and majesty, to see and consider the concordance between the laws penned and as it were dicted *verbatim* by the same reason. On the other side, the diversities between the civil Roman rules of law and ours, — happening either when there is such an indifferency of reason so equally balanced, as the one law embraceth one course, and the other the contrary, and both just after either is once positive and certain, or where the laws vary in regard of accommodating the law to the different considerations of estate, — I have not omitted to set down with the reasons.

Thirdly, whereas I could have digested these rules into a certain method or order, which, I know, would have been more admired, as that which would have made every particular rule, through his coherence and relation unto other rules, seem more cunning and more deep; yet I have avoided so to do, because this delivering of knowledge in distinct and disjoined aphorisms doth leave the wit of man more free to turn and toss, and to make use of that which is so delivered to more several purposes and applications.[1] For we see all the ancient wisdom and science was wont to be delivered in that form; as may be seen by the parables of Solomon, and by the aphorisms of Hippocrates, and the

[1] The Camb. MS. leaves out from this word to "chiefly" inclusive, and substitutes the word "wherein."

moral verses of Theognis and Phocylides: but chiefly the precedent of the civil law, which hath taken the same course with their rules, did confirm me in my opinion.

Fourthly, whereas I know very well it would have been more plausible and more current, if the rules with the expositions of them had been set down either in Latin or in English, that the harshness of the language might not have disgraced the matter, and that civilians, statesmen, scholars, and other sensible men might not have been barred from them; yet I have forsaken that grace and ornament of them, and only taken this course: the rules themselves I have put in Latin (not purified further than the propriety of terms of law would permit; but Latin); which language I chose, as the briefest to contrive the rules compendiously, the aptest for memory, and of the greatest authority and majesty to be vouched and alleged in argument: and for the expositions and distinctions, I have retained the peculiar language of our law, because it should not be singular among the books of the same science, and because it is most familiar to the students and professors thereof, and besides that it is most significant to express conceits of law; and to conclude, it is a language wherein a man shall not be enticed to hunt after words but matter. And for excluding any others than professed lawyers, it was better manners to exclude them by the strangeness of the language, than by the obscurity of the conceit; which is such as, though it had been written in no private and retired language, yet by those that are not lawyers would for the most part have been either not understood, or, which is worse, mistaken.

Fifthly, whereas it might have been more flourish and ostentation of reading to have vouched the authorities, and sometimes to have enforced or noted upon them; yet I have abstained from that also. And the reason is, because I judged it a matter undue and preposterous to prove rules and maxims; wherein I had the example of Mr. Littleton and Mr. Fitzherbert, whose writings are the institutions of the laws of England: whereof the one forbeareth to vouch any authority altogether; the other never reciteth a book, but when he thinketh the case so weak of credit in itself as it needeth a surety. And these two I did far more esteem than Mr. Perkins or Mr. Standford, that have done the contrary. Well will it appear to those that are learned in the laws, that many of the cases are judged cases, either within the books or of fresh report, and most of them fortified by judged cases and similitude of reason; though, in some few cases, I did intend expressly to weigh down the authorities by evidence of reason, and therein rather to correct the law, than either to soothe a received error, or by unprofitable subtlety, which corrupteth the sense of the law, to reconcile contrarieties. For these reasons I resolved not to derogate from the authority of the rules by vouching of the authority of the cases, though in mine own copy I had them quoted: for although the meanness of mine own person may now at first extenuate the authority of this collection, and that every man is adventurous to control; yet, surely, according to Gamaliel's reason, if it be of weight, time will settle and authorise it; if it be light and weak, time will reprove it. So that, to conclude, you have here a work without any glory of affected novelty, or of method,

or of language, or of quotations and authorities, dedicated only to use, and submitted only to the censure of the learned, and chiefly of time.

Lastly, there is one point above all the rest I account the most material for making these rules indeed profitable and instructing; which is, that they be not set down alone, like short dark oracles, which every man will be content still to allow to be true, but in the meantime they give little light or direction; but I have attended them, (a matter not practised, no not in the civil law to any purpose, and for want whereof, indeed, the rules are but as proverbs, and many times plain fallacies,) with a clear and perspicuous exposition; breaking them into cases, and opening their sense and use and limiting them with distinctions; and sometimes showing the reasons above whereupon they depend, and the affinity they have with other rules. And though I have thus, with as good discretion and foresight as I could, ordered this work, and, as I might say, without all colours or shows, husbanded it best to profit; yet, nevertheless, not wholly trusting to mine own judgment; having collected three hundred of them, I thought good, before I brought them all into form, to publish some few;[1] that by the taste of other men's opinions in this first, I might receive either approbation in mine own course, or better advice for the altering of the other[1] which remain. For it is great reason that that which is intended to the profit of others should be guided by the conceits of others.

[1] The Camb. MS. has "to publish the first," and afterwards "for the altering of the other two."

# REGULÆ.

1. In jure non remota causa, sed proxima spectatur.
2. Non potest adduci exceptio ejusdem rei, cujus petitur dissolutio.
3. Verba fortius accipiuntur contra proferentem.
4. Quod sub certa forma concessum vel reservatum est, non trahitur ad valorem vel compensationem.
5. Necessitas inducit privilegium quoad jura privata.
6. Corporalis injuria non recipit æstimationem de futuro.
7. Excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus.
8. Æstimatio præteriti delicti ex post facto nunquam crescit.
9. Quod remedio destituitur ipsa re valet, si culpa absit.
10. Verba generalia restringuntur ad habilitatem rei vel personæ.
11. Jura sanguinis nullo jure civili dirimi possunt.
12. Receditur a placitis juris potius quam injuriæ et delicta maneant impunita.
13. Non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram.
14. Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens quæ sortiatur effectum interveniente novo actu.
15. In criminalibus sufficit generalis malitia intentionis cum facto paris gradus.
16. Mandata licita recipiunt strictam interpretationem, sed illicita latam et extensam.
17. De fide et officio judicis non recipitur quæstio, sed de scientia, sive error sit juris sive facti.

18. Persona conjuncta æquiparatur interesse proprio.
19. Non impedit clausula derogatoria quominus ab eadem potestate res dissolvantur a quibus [1] constituuntur.
20. Actus inceptus cujus perfectio pendet ex voluntate partium revocari potest; si autem pendet ex voluntate tertiæ personæ, vel ex contingenti, revocari non potest.
21. Clausula vel dispositio inutilis per præsumptionem remotam vel causam ex post facto non fulcitur.
22. Non videtur consensum retinuisse, si quis ex præscripto minantis aliquid immutavit.
23. Licita bene miscentur, formula nisi juris obstet.
24. Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis.
25. Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.

[1] So, I believe, in all the MSS. and editions, and therefore the slip is probably of Bacon's pen.

THE

# MAXIMS OF THE LAW.

## REGULA I.

*In jure non remota causa, sed proxima spectatur.*

It were infinite for the law to judge the causes of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree.

As if an annuity be granted *pro consilio impenso et impendendo*, and the grantee commit treason, whereby he is imprisoned, so that the grantor cannot have access unto him for his counsel; yet, nevertheless, the annuity is not determined by this *non-feasance*. Yet it was the grantee's act and default to commit the treason, whereby the imprisonment grew: but the law looketh not so far, but excuseth him, because the not giving counsel was compulsory and not voluntary, in regard of the imprisonment. 6 H. 8. Dy. f. 1, 2.

So if a parson make a lease, and be deprived, or resign, the successor shall avoid the lease: and yet the cause of deprivation, and more strongly of a resignation, moved from the party himself: but the law regardeth not Litt. secs. 643. et seq. 2 H. 4. f. 5. pl. 18. 26 H. 8. f. 2. pl. 8.

that; because the admission of the new incumbent is the act of the ordinary.[1]

5 H. 7. f. 35. pl. 3. [2]So if I be seised of an advowson in gross, and a usurpation be had against me, and at the next avoidance I usurp arere, I shall be remitted: and yet the presentation, which is the act remote, is mine own act; but the admission of my clerk, whereby the inheritance is reduced to me, is the act of the ordinary.

So if I covenant with I. S. a stranger, in consideration of natural love to my son, to stand seised to the use of the said I. S. to the intent he shall enfeoff my son; by this no use ariseth to I. S. because the law doth respect that there is no immediate consideration between me and I. S.

Dy. f. 1. 12 H. 4. f. 23. pl. 6. [3]So if I be bound to enter into a statute before the mayor of the staple at such a day for the security of a hundred pounds, and the obligee, before the day, accept of me a lease of a house in satisfaction; this is no plea in debt upon my obligation: and yet the end of that statute was but security of money; but because the entering into this statute itself, which is the immediate act whereto I am bound, is a corporal act which lieth not in satisfaction, therefore the law taketh no consideration that the remote intent was for money.

Winnington's case, 2 Co. 59. [4][37 El. Chester.] So if I make a feoffment in fee upon condition that the feoffee shall enfeoff over, and the feoffee be disseised, and a descent cast, and

[1] The Cambridge MS. states the law as to deprivation only; adding: "But of a resignation it is otherwise; for that is merely the act of the party."

[2] Omitted in Camb. MS.

[3] Omitted in Camb. MS.

[4] This marginal reference must have been made, I think, while the case

then the feoffee bind himself in a statute, which statute is discharged before the recovery of the land: this is no breach of the condition, because the land was never liable to the statute; and the possibility that it should be liable upon the recovery the law doth not respect.

So if I enfeoff two upon condition to enfeoff, and one of them take a wife; the condition is not broken: and yet there is a remote possibility that the joint-tenant may die, and then the feme is intitled to dower.

So if a man purchase land in fee-simple, and die without issue: in the first degree the law respecteth dignity of sex, and not proximity; and therefore the remote heir on the part of the father shall have it before the near heir on the part of the mother: but in any degree paramount the first the law respecteth it not; and therefore the near heir by the grandmother on the part of the father shall have it before the remote heir of the grandfather on the part of the father. See Blackstone Com. Book 2. c. 14.

This rule faileth in covinous acts, which though they be conveyed through many degrees and reaches, yet the law taketh heed to the corrupt beginning, and counteth all as one entire act.

As if a feoffment be made of lands held by knight's service to I. S. upon condition that he within a certain time shall enfeoff I. D. which feoffment to I. D. shall be to the use of the wife of the first feoffor for her jointure, &c.; this feoffment is within the statute of 32 H. VIII. *nam dolus circuitu non purgatur.* [37 Eliz. Dacre's case, obiter.]

stood as a judgment of the court at Chester, and before it was brought before the Queen's Bench.

[Cattelyn and others in Stoel's case.] In like manner this rule holdeth not in criminal acts, except they have a full interruption; because when the intention is matter of substance and that which the law doth principally behold, there the first motive will be principally regarded, and not the last impulsion. As if I. S. of malice prepense discharge a pistol at I. D. and miss him, whereupon he throws down his pistol and flies, and I. D. pursueth him to kill him, whereupon he turneth and killeth I. D. with a dagger; if the law should consider the last impulsive cause, it should say that it was in his own defence: but the law is otherwise, for it is but a pursuance and extention of the first murderous intent.

44 Ed. 3. f. 44. pl. 55. [1] But if I. S. had fallen down, his dagger drawn, and I. D. had fallen by haste upon his dagger, there I. D. had been *felo de se*, and I. S. should go quit.

Also you may not confound [2] the act with the execution of the act; nor the entire act with the last part, or the consummation of the act.

Lit. sec. 410. For if a disseisor enter into religion, the immediate cause is from the party, though the descent be cast by act in law: but the law doth but execute the act which the party procureth; and therefore the descent shall not bind. *Et è converso;*

[21 Eliz.] Dy. f. 4, 5. If a lease for years be made rendering rent, and the lessee make a feoffment of part, and the lessor enter; the immediate cause is from the law in respect of the forfeiture, though the entry be the act of the party: but that is but the pursuance and putting in

[1] Omitted in Camb. MS.

[2] The Camb. MS. has: "the act itself with the execution only of the act, and so the cause of the act with the cause of the execution of the act, and by that means make the immediate cause a remote cause."

execution of the title which the law giveth; and therefore the rent or condition shall be apportioned.

[1] So in the binding of a right by a descent, you are to consider the whole time from the disseisin to the descent cast; and if at all times the person be not privileged, the descent binds.

And therefore, if a feme covert be disseised, and the baron dieth, and she taketh a new husband, and then the descent is cast; or if a man that is not *infra quatuor maria* be disseised, and return into England, and go over sea again, and then a descent is cast; this descent bindeth, because of the *interim* when the persons might have entered: and the law respecteth not the state of the person at the last time of the descent cast, but a continuance from the very disseisin to the descent. 9 H. 7. 24. Dy. f. 143, 144.

So if baron and feme be, and they join in a feoffment of the wife's land rendering a rent, and the baron die, and the feme take a new husband before any rent-day, and he accept the rent; the feoffment is affirmed for ever. Dy. f. 159.

## REGULA II.

*Non potest adduci exceptio ejusdem rei, cujus petitur dissolutio.*

It were impertinent and contrary in itself for the law to [2] allow of a plea in bar of such matter as is

[1] The remaining cases under this rule are omitted in the Camb. MS. They would not have illustrated the rule as there enunciated, and given in the preceding note.

[2] The Camb. MS. has: "to give a man remedies, and then to cut him off the means to come at the effect of his suit by an allegation collateral, which the principal suit doth include and make an end of."

to be defeated by the same suit: for it is included; and otherwise a man should never come to the end and effect of his suit, but be cut off in the way.

And therefore, if tenant in tail of a manor whereunto a villain is regardant discontinue, and die, and the right of the entail descend unto the villain himself, who brings *formedon*, and the discontinuee pleadeth villenage; this is no plea: because the *devester* of the manor, which is the intention of the suit, doth include this plea; because it determineth the villenage.

50 E. 3. f. 24. pl. 16. [1]So if tenant in ancient demesne be disseised by the lord, whereby the seigniory is suspended, and the disseisee bring his assize in the court of the lord, frank fee is no plea: because the suit is to undo the disseisin, and so to revive the seigniory in ancient demesne.

So if a man be attainted and executed, and the heir bring error upon the attainder, and corruption of blood by the same attainder be pleaded to interrupt his conveying in the same writ of error; this is no plea: for then he were without remedy ever to reverse the attainder.[2]

38 Ed. 3. f. 32. So if tenant in tail discontinue for life rendering rent, and the issue brings *formedon*, and the warranty of his ancestor with assets is pleaded against him, and the assets is layed to be no other but his reversion with the rent; this is no plea: because the *formedon*, which is brought to undo this

[1] Omitted in Camb. MS.

[2] The Camb. MS. cites 11 Hen. 4. fo. 65, pl. 22, the case of executors bringing error to reverse an outlawry, which may have suggested or confirmed Bacon in his principle. "Conveying" here and below seems to mean "claiming" or "deriving title."

discontinuance, doth inclusively undo this new reversion in fee, and the rent thereunto annexed.

But whether this rule may take place where the matter of the plea is not to be avoided in the same suit, but in another suit, is doubtful: and I rather take the law to be, that this rule doth extend to such cases, where otherwise the party were at a mischief, in respect the exceptions and bars might be pleaded cross, either of them in the contrary suit, and so the party altogether prevented and intercepted to come by his right.[1]

So if a man be attainted by two several attainders, and there is error in them both, there is no reason but there should be a remedy open for the heir to reverse those attainders, being erroneous, as well if they be twenty as one. And therefore if, in the writ of error brought by the heir of one of them, the other attainder should be a plea peremptorily; and so again, in error brought of that other, the former should be a plea; this were to exclude him utterly of his right: and therefore it shall be a good replication, to say that he hath a writ of error depending of that also; and so the court shall proceed: but no judgment shall be given till both pleas be discussed; and if either plea be found without error, there shall be no reversal either of the one or of the other; and if he discontinue either writ, then shall it be no longer a

[1] The Camb. MS. has: "This rule may be extended upon the general reason thereof; which is this: that when the law seeth that a man hath right, it will not prevent him of the means to recover it. And therefore though the exception be not comprehended in the same suit, but be out of it, yet, if there be remedy also to defeat that impediment by another suit, the law will not permit the party to be at a mischief, and [that] the exceptions should be pleaded cross either of them in the other suit."

plea. [1] And so of several outlawries in a personal action.

And this seemeth to be more reasonable, than that generally an outlawry or an attainder should be no plea in a writ of error brought upon a diverse out-
7 H. 4. f. 39. pl. 4. 7. H. 6. f. 44. pl. 22. lawry or attainder, as 7 H. IV. and 7 H. VI. seem to hold. For that is a remedy too large for the mischief; for there is no reason, if any of the outlawries or attainders be indeed without error, but it should be a peremptory plea to the person in a writ of error, as well as in any other action.

But if a man levy a fine *sur conusaunce de droit come ceo que il ad de son done*, and suffer a recovery of the same lands, and there be error in them both; he cannot bring error first of the fine, because by the recovery his title of error is discharged and released in law *inclusivè:* but he must begin with the
[37 Eliz.] error upon the recovery, (which he may do, because a fine executed barreth no titles that accrue *de puisne temps* after the fine levied,) and so restore himself to his title of error upon the fine. But so it is not in the former case of the attainder; for a writ of error to a former attainder is not given away by a second, except it be by express words of an act of parliament, but only it remaineth a plea to his person while he liveth, and to the conveyance of the heir after his death.

But if a man levy a fine where he hath nothing in the land, which inureth by way of conclusion only, and is executory against all purchases and new titles which

[1] This last sentence and the whole of the following paragraph are omitted in the Camb. MS.

shall grow to the conusor afterwards, and he purchase the land, and suffer a recovery to the conusee, and in both fine and recovery there is error; this fine is *Janus bifrons*, and will look forwards to bar him of his writ of error brought of the recovery; and therefore it will come to the reason of the first case of the attainder, that he must reply that he hath a writ also depending of the same fine, and so demand judgment.[1]

To return to our first purpose: like law is it if tenant in tail of two acres make two several discontinuances to several persons for life rendering rent, and the issue after his death bringeth *formedon* of both, and in the *formedon* brought of white acre the reversion and rent reserved upon black acre is pleaded, and so contrary. I take it to be a good replication, that he hath *formedon* also upon that depending, whereunto the tenant hath pleaded the descent of the reversion of white acre; and so neither shall be a bar.[2] And yet there is no doubt but, if in a *formedon* the warranty of tenant in tail with assets be pleaded, it is no replication for the issue to say that a *præcipe* dependeth brought by I. S. to evict the assets. But the former case standeth upon the particular reason before mentioned.

Fitz. Tit. Age, pl. 45.

[1] In lieu of the two preceding paragraphs the Camb. MS. has: "But if a man levy many fines of the same lands and there be an error in them all, yet he cannot bring error of any save the last: because by his own later fines he gave away his title of error to the former fines *inclusivè*. But when a man is attainted, his writ of error to a former attainder is not given away, but only it remaineth a plea to his person while he liveth, and to the conveyance of the heir after his death."

[2] This is omitted, to the end, in Camb. MS.

## REGULA III.

*Verba fortius accipiuntur contra proferentem.*

This rule, that a man's deeds and his words shall be taken strongliest against himself, though it be one of the most common grounds of the law, it is notwithstanding a rule drawn out of the depth of reason. For, first, it is a schoolmaster of wisdom and diligence in making men watchful in their own business; next, it is author of much quiet and certainty, and that in two sorts; first, because it favoureth acts and conveyances executed, taking them still beneficially for the grantees and possessors; and secondly, because it makes an end of many questions and doubts about construction of words; for if the labour were only to pick out the intention of the parties, every judge would have a several sense; whereas this rule doth give them a sway to take the law more certainly one way.

[1] But this rule, as all others which are very general, is but a sound in the air, and cometh in sometimes to help and make up other reasons without any great instruction or direction, except it be duly conceived in point of difference, where it taketh place, and where not. And first we will examine it in grants; and then in pleadings.

The force of this rule is in three things: in ambiguity of words; in implication of matter; and in reducing and qualifying the exposition of such grants as were against the law, if they were taken according to their words.

2 R. 3. f. 18. pl. 46. 21 H. 7. f. 29. pl. 3. And, therefore, if I. S. submit himself to arbitrement of all actions and suits between

[1] Omitted in Camb. MS.

him and I. D. and I. N., it rests ambiguous whether this submission shall be intended *collectivè* of joint actions only, or *distributivè* of several actions also: but because the words shall be strongliest taken against I. S. that speaks them, it shall be understood of both. For if I. S. had submitted himself to arbitrement of all actions and suits which he hath now depending, except it be such as are between him and I. D. and I. N., now it shall be understood *collectivè* only of joint actions: because in the other case large construction was hardest against him that speaks, and in this case strict construction is hardest.

[1] So if I grant ten pounds rent to baron and feme, and if the baron die that the feme shall have three pounds rent; because these words rest ambiguous, whether I intend three pounds by way of increase or three pounds by way of restraint and abatement of the former rent of ten pounds, it shall be taken strongliest against me that am the grantor; that is, three pounds addition to the ten pounds. But if I had let lands to baron and feme for three lives reserving ten pounds per annum, and, if the baron die, *reddendo* three pounds; this shall be taken contrary to the former case, to abridge my rent only to three pounds. 8 Ass. pl. 10.

So if I demise *omnes boscos meos in villa de Dale* for years; this passeth the soil: but if I demise all my lands in Dale *exceptis boscis;* this extendeth to the trees only, and not to the soil. 14 H. 8. f. 1. pl. 1. Dy. f. 9.

[1] The Camb. MS. omits this, and proceeds to give one example of cases of *implication:* "So in implications; if I. S. grant all his woods in such a close, it implies a liberty unto the grantee to come upon the ground and cut them down: but if I. S. lease the close excepting the woods, then himself shall have no such liberty, because he did not specially reserve it." And it omits the cases in the five following paragraphs.

So if I sow my land with corn, and let it for years; the corn passeth to the lessee, if I except it not: but if I make a lease for life to I. S. upon condition that upon request he shall make me a lease for years, and I. S. sow the ground, and then I make request; I. S. may well make me a lease excepting his corn, and not break the condition.

8 H. 7. f. 4, 5. 32 H. 6. f. 24. pl. 10. Dy. f. 30. So if I have free warren in my own land, and let my land for life, not mentioning the warren; yet the lessee, by implication, shall have the warren discharged and extinct during his lease: but if I let the land *una cum libera garrena*, excepting white acre; there the warren is not by implication reserved unto me either to be enjoyed or extinguished; but the lessee shall have warren against me in white acre.

29 Ass. pl. 20. So if I. S. hold of me by fealty and rent only, and I grant the rent, not speaking of the fealty; yet the fealty by implication shall pass, because my grant shall be taken strongly as of a rent service, and not of a rent secke.

44 Ed. 3. f. 19. pl. 15. Otherwise had it been if the seigniory had been by homage, fealty, and rent; because of the dignity of the service, which could not have passed by intendment by the grant of the rent.

But if I be seised of the manor of Dale in fee, whereof I. S. holds by fealty and rent, and I grant the manor, excepting the rent; the fealty shall pass to the grantee, and I shall have but a rent secke.

So in grants against the law: if I give land to I. S. and his heirs males, this is a good fee-simple, which is a larger estate than the words seem to intend, and the word "males" is void. But if I make a gift in tail,

reserving rent to me and the heirs of my body, the words "of my body" are not void, and so to leave it a rent in fee-simple; but the words "heirs" and all are void, and leave it but a rent for life: except that you will say, it is but a limitation to any my heir in fee-simple which shall be heir of my body; for it cannot be a rent in tail by reservation.

So if I give land with my daughter in frank marriage, the remainder to I. S. and his heirs; this grant cannot be good in all parts, according to the words; for it is incident to the nature of a gift in frank marriage, that the donee hold of the donor: and therefore my deed shall be taken so strongly against myself, that, rather than the remainder shall be void, the frank marriage, though it be first placed in the deed, shall be void as a frank marriage. 45 Ed. 3. f. 18. pl. 22. 1 [24 Eliz.]

[2] But if I give land in frank marriage, reserving to me and my heirs ten pounds rent; now the frank marriage stands good, and the reservation is void, because it is a limitation of a benefit to myself, and not to a stranger. 4 H. 6. f. 22 pl. 6. 26 Ass. pl. 66.

So if I let white acre, black acre, and green acre to I. S. excepting white acre, this exception is void, because it is repugnant; but if I let the three acres aforesaid, rendering twenty shillings rent, viz. for white acre ten shillings, and for black acre ten shillings, I shall not distrain at all in green acre, but that shall be discharged of my rent.

So if I grant a rent to I. S. and his heirs out of my manor of Dale, *et obligo manerium* 46 E. 3. f. 18. pl. 17.

[1] Perhaps Webb *v.* Porter cited by Sir Matthew Hale in his notes on Co. Lit. 21 *a*.

[2] All these remaining cases of *grants against the law* are omitted in the Camb. MS.

*prædictum et omnia bona et catalla mea super manerium prædictum existentia ad distringendum per ballivos domini regis:* this limitation of the distress to the king's bailiffs is void; and it is good to give a power of distress to I. S. the grantee, and his bailiffs.

2 Ed. 4. f. 5. pl. 11. But if I give land in tail *tenendum de capitalibus dominis per redditum viginti solidorum et fidelitatem:* this limitation of tenure to the lord is void; and it shall not be good, as in the other case, to make the reservation of twenty shillings good unto myself; but it shall be utterly void, as if no reservation at all had been made: and if the truth be that I, that am the donor, hold of the lord paramount by ten shillings only, then there shall be ten shillings only intended to be reserved upon the gift in tail as for owelty.

21 Ed. 3. f. 49. pl. 79. Dy. f. 46. So if I give land to I. S. and the heirs of his body, and for default of such issue *quod tenementum prædictum revertatur ad I. N.;* yet these words of reversion will carry a remainder to a stranger. But if I let white acre to I. S. excepting ten shillings 35 H. 6. f. 34. rent, these words of exception to mine own benefit shall never inure to words of reservation.

But now it is to be noted, that this rule is the rule which is last to be resorted to, and is never to be relied upon but where all other rules of exposition of words fail; and if any other rule come in place, this giveth place. And that is a point worthy to be observed generally in the rules of the law, when they encounter and cross one another in any case, that it be understood which the law holdeth worthier and to be preferred. And it is in this particular very notable to consider, that this being a rule of some strictness and rigour, doth not, as it were, his office, but in absence of other

rules which are of more equity and humanity. Which rules you shall find afterwards set down with their expositions and limitations. But now to give a taste of them to this present purpose:

It is a rule, that general words shall never be stretched to a foreign intendment; which the civilians utter thus: *Verba generalia restringuntur ad habilitatem personæ, vel ad aptitudinem rei.* Therefore, 14 Ass. pl. 21. if a man grant to another common *intra metas et bundas villæ de Dale*, and part of the ville is his several, and part is his waste and common; the grantee shall not have common in the several: and yet that is the strongest exposition against the grantor.

So it is a rule, *Verba ita sunt intelligenda,* Litt. sec. 345. *ut res magis valeat, quam pereat.* And therefore if I give land to I. S. and his heirs, *reddendo quinque libras annuatim* to I. D. and his heirs; this implies a condition to me that am the grantor: yet it were a stronger exposition against me to say the limitation should be void, and the feoffment absolute.

So it is a rule, that the law will not intend a wrong; which the civilians utter thus: *Ea est accipienda interpretatio, quæ vitio caret.*[1] And therefore if 10 Ed. 4. f. 1. pl. 1. the executors of I. S. grant *omnia bona et catalla sua*, the goods which they have as executors will not pass, because *non constat* whether it may be a devastation, and so a wrong: and yet against a trespasser that taketh them out of their hand they shall declare *quod bona sua cepit.*

[1] The Camb. MS. here gives a different example: "So if I grant all the timber trees *crescentes super terras meas in* D., and I have lands in D. in fee simple and other lands for life, this grant shall be construed only to extend to the lands I have in fee simple: and yet the other exposition were stronger against me. And so it is of all other rules of exposition of words," And here this *Regula* ends in the MS.

So it is a rule, words are to be understood that they work somewhat, and be not idle and frivolous: *Verba aliquid operari debent; verba cum effectu sunt accipienda.* And therefore if I bargain and sell you four parts of my manor of Dale, and say not in how many parts to be divided; this shall be construed four parts of five, and not of six nor seven, &c. because that is strongest against me. But on the other side, it shall not be intended four parts of four parts, that is the whole, or four quarters; and yet that were strongest of all: but then the words were idle and of none effect.

So it is a rule, *Divinatio, non interpretatio est, quæ omnino recedit a litera.* And therefore if I have a fee farm-rent issuing out of white acre of ten shillings, and I reciting the same reservation do grant to I. S. the rent of five shillings *percipiend' de reddit' prædict' et de omnibus terris et tenementis meis in Dale*, with clause of distress; although there be atturnment, yet nothing passeth out of my former rent. And yet that were strongest against me, to have it a double rent or grant of part of that rent with an enlargement of a distress in the other land: but, for that it is against the words, — because *copulatio verborum inclinat acceptionem in eodem sensu*, and the word *de* (*anglicè* out of) may be taken in two senses, that is, either as a less sum out of a greater, or as a charge out of land or other principal interest; and that the coupling of it with lands and tenements doth define the sense to be one rent issuing out of another, and not as a less rent to be taken by way of computation out of a greater; — therefore nothing passeth of that rent. But if it stood of itself, without these words "lands and tenements:" *viz.* I, reciting that I am seised of such a rent of ten shillings, do grant

3 H. 6. f. 20. pl. 34.

five shillings *percipiend' de eodem reddit'* it is good enough with atturnment; because *percipiend' de etc.* may well be taken for *parcella de etc.* without violence to the words. But if it had been *percipiend' de* I. S. without saying *de redditibus prædict'*, although I. S. be the person that payeth me the foresaid rent of ten shillings, yet it is void. And so it is of all other rules of exposition of grants; when they meet in opposition with this rule, they are preferred.

Now to examine this rule in pleadings as we have done in grants; you shall find that in all imperfections of pleadings; whether it be in ambiguity of words and double intendments; or want of certainty and averments; or impropriety of words; or repugnancy and absurdity of words; ever the plea shall be strictly and strongly taken against him that pleads.

For ambiguity of words:

If in a writ of entry upon disseisin the tenant pleads jointenancy with I. S. of the gift and feoffment of I. D. judgment *de briefe;* and the demandant saith that long time before I. D. any thing had, the demandant himself was seised in fee *quousque prædict' I. D. super possessionem ejus intravit*, and made a joint feoffment, whereupon he the demandant reentered, and so was seised until by the defendant alone he was disseised; this is no plea: because the word *intravit* may be understood either of a lawful entry, or of a tortious, and the hardest against him shall be taken, which is, that it was a lawful entry: therefore he should have alleged precisely that I. D. *disseisivit.* 22 H. 6. f. 43. pl. 27.

So upon ambiguity that grows by reference: if an action of debt be brought against I. N. and I. P. sheriffs of London, upon an escape, and the Dy. f. 66.

plaintiff doth declare upon an execution by force of a recovery in the prison of Ludgate *sub custodia* I. S. *et* I. D. then sheriffs in 1 K. H. VIII. and that he so continued *sub custodia* I. B. *et* I. G. in 2 K. H. VIII. and so continued *sub custodia* I. N. *et* I. L. in 3 K. H. VIII. and then was suffered to escape; I. N. and I. P.[1] plead, that before the escape supposed, at such a day *anno superius in narratione specificato*, the said I. B. and I. G. *ad tunc vicecomites* suffered him to escape; this is no good plea: because there be three years specified in the declaration, and it shall be hardest taken that it was 1 or 3 H. VIII. when they were out of office. And yet it is nearly induced by the *ad tunc vicecomites*, which should lead the intendment to be of that year in which the declaration supposeth that they were sheriffs; but that sufficeth not, but the year must be alleged in fact; for it may be it was mislaid by the plaintiff, and therefore the defendants meaning to discharge themselves by a former escape, which was not in their time, must allege it precisely.

For incertainty of intendment:

[26 H. 8.] If a warranty collateral be pleaded in bar, and the plaintiff by replication, to avoid the warranty, saith that he entered upon the possession of the defendant; *non constat* whether this entry was in the life of the ancestor, or after the warranty attached: and therefore it shall be taken in hardest sense, that it was after the warranty descended, if it be not otherwise averred.

For impropriety of words:

39 H. 6. f. 5. pl. 6. If a man plead that his ancestor died by

[1] L. in MSS. It seems intended the defendants should come into office in the 4th year, and the case is so stated in Dyer.

protestation seised, and that I. S. abated &c. this is no plea: for there can be no abatement except there be a dying seised alleged in fact; and an abatement shall not be improperly taken for disseisin in pleading, *car parols font pleas.*

For repugnancy:

If a man in his avowry declare, that he was seised in his demesne as of fee of white acre, and being so seised did demise the same white acre to I. S. *habendum* the one moiety for twenty-one years from the date of the deed, the other moiety from the surrender, expiration, or determination of the estate of I. D. *qui tenet prædict' medietatem ad terminum vitæ suæ reddend'* 40s. rent: this declaration is insufficient, because the seisin that he hath alleged in himself in his demesne as of fee in the whole, and the estate for life of a moiety, are repugnant; and it shall not be cured by taking the last, which is express, to control the former, which is but general and formal; but the plea is naught: yet the matter in law had been good to have entitled him to have distrained for the whole rent. Dy. f. 256.

But the same restraint follows this rule in pleadings that was before noted in grants: for if the case be such as falleth within another rule of pleading, then this rule may not be urged.

And therefore,

It is a rule that a bar is good to a common intent, though not to every intent. As if debt be brought against five executors, and three of them make default, and two appear and plead in bar a recovery had against them two of three hundred pounds and nothing in their hands over and above that sum; if this bar should be taken strongliest against 9 Ed. 4. f. 12. pl. 4. Plow. f. 33. b.

them, then it should be intended that they might have abated the first suit, because the other three were not named, and so the recovery not duly had against them: but because of this other rule the bar is good; for that the more common intent will say, that they two did only administer, and so the action well conceived, rather than to imagine that they would have lost the benefit and advantage of abating the writ.

So there is another rule, that in pleading a man shall not disclose that which is against himself: and therefore if it be a matter that is to be set forth on the other side, then the plea shall not be taken in the hardest sense, but in the most beneficial, and to be left unto the contrary party to allege.

Dy. f. 17. And therefore, if a man be bound in an obligation, that if the feme of the obligee do decease before the Feast of St. John the Baptist which shall be in the year of our Lord God 1598,[1] without issue of her body by her husband lawfully begotten then living, that then the bond shall be void; and in debt brought upon this obligation the defendant pleads that the feme died before the said feast without issue of her body then living: if this plea should be taken strongliest against the defendant, then should it be taken that the feme had issue at the time of her death, but this issue died before the feast: but that shall not be so understood, because it makes against the defendant, and it is to be brought in on the plaintiff's side, and that without traverse.

30 E. 3. f. 25. So if in detinue brought by a feme against

[1] The case in Dyer is of 28 Hen. VIII. This date therefore, in which all the MSS. (except the Camb. MS. which does not contain the case) and editions agree, seems to fix the date of composition of this particular paragraph as one at which Midsummer 1598 might suggest itself to Bacon while writing. See supra, p. 167, note 1.

the executors of her husband for the reasonable part of the goods of her husband [and] her demand is of a moiety, and she declares upon the custom of the realm, by which the feme is to have a moiety if there be no issue between her and her husband, and the third part if there be issue had, and declareth that her husband died without issue had between them; if this count should be hardliest construed against the party, it should be intended that her husband had issue by another wife, though not by her, in which case the feme is but to have the third part likewise; but that shall not be so intended, because it is matter of reply to be showed of the other side.

And so it is of all other rules of pleading; these being sufficient, not for the exact expounding of these other rules, but *obiter* to show how this rule which we handle is put by when it meets with any other rule.

As for acts of parliament, verdicts, judgments, &c., which are not words of parties, in them this rule hath no place at all; neither in devises and wills, upon several reasons: but more especially it is to be noted, that in evidence it hath no place, which yet seems to have some affinity with pleadings, especially when demurrer is joined upon the evidence.

And, therefore, if land be given by will by H. C. to his son I. C. and the heirs males of his body begotten; the remainder to F. C. and the heirs males of his body begotten; the remainder to the heirs males of the body of the devisor; the remainder to his daughter S. C. and the heirs of her body, with a clause of perpetuity; and the question comes upon the point of forfeiture in an assize taken by default, and evidence is given, and demurrer upon evidence; and in Plow. f. 412.

the evidence given to maintain the entry of the daughter upon a forfeiture, it is not set forth nor averred that the devisor had no other issue male; yet the evidence is good enough, and it shall be so intended.

And the reason thereof cannot be, because a jury may take knowledge of matters not within the evidence, and the court contrariwise cannot take knowledge of any matter not within the pleas: for it is clear that if the evidence had been altogether remote and not proving the issue, there, although the jury might find it, yet a demurrer might well be taken upon the evidence. But I take the reason of difference to be, between pleadings, which are but openings of the case, and evidences, which are the proofs of an issue: for pleadings, being but to open the verity of the matter in fact indifferently on both parts, have no scope and conclusion to direct the construction and intendment of them, and therefore must be certain; but in evidence and proofs the issue, which is the state of the question and conclusion, shall incline and apply all the proofs as tending to that conclusion. Another reason is, that pleadings must be certain, because the adverse party may know whereto to answer, or else he were at a mischief; which mischief is remedied by demurrer: but in evidence, if it be short, impertinent, or uncertain, the adverse party is at no mischief, because it is to be thought the jury will pass against him: yet, nevertheless, because the jury is not compellable to supply the defect of evidence out of their own knowledge, though it be in their liberty so to do, therefore the law alloweth a demurrer upon evidence also.

## REGULA IV.[1]

*Quod sub certa forma concessum vel reservatum est non trahitur ad valorem vel compensationem.*

THE law permitteth every man to part with his own interest, and to qualify his own grant, as it pleaseth himself; and therefore doth not admit any allowance or recompense, if the thing be not taken as it is granted.

So in all profits *a prendre:*

If I grant common for ten beasts, or ten loads of wood out of my coppice, or ten loads of hay out of my meads, to be taken for three years; he shall not have common for thirty beasts, or thirty loads of wood or hay, the third year, if he forbear for the space of two years. Here the time is certain and precise. 27 H. 6. f. 10. pl. 5.

So if the place be limited; as if I grant estovers to be spent in such a house, or stone towards the reparation of such a castle; although the grantee do burn of his fuel and repair of his own charge, yet he can demand no allowance for that he took not.

So if the kind be specified; as if I let my park reserving to myself all the deer and sufficient pasture for them; if I do decay the game, whereby there is no deer, I shall not have quantity of pasture answerable to the feed of so many deer as were upon the ground when I let it, but am without any remedy, except I will replenish the ground again with deer.

But it may be thought that the reason of these

[1] Omitted in Camb. MS.

cases is the default and laches of the grantee, which is not so.

For put the case that the house where the estovers should be spent be overthrown by the act of God, as by tempest, or burnt by the enemies of the king; yet there is no recompense to be made.

And in the strongest case, where it is [in][1] default of the grantor; yet he shall make void his own grant rather than the certain form of it should be wrested to an equity or valuation.

9 H. 6. f. 35, 36. pl. 8. As if I grant common *ubicunque averia mea ierint*, the commoner cannot otherwise entitle himself, except that he aver that in such grounds my beasts have gone and fed; and if I never put in any, but occupy my grounds otherwise, he is without remedy: but if I once put in, and after by poverty or otherwise desist, yet the commoner may continue: contrariwise, if the words of the grant had been *quandocunque averia mea ierint*, for there it depends continually upon the putting in of my beasts, or at least the general seasons when I put them in; not upon every hour or moment.

So if I grant *tertiam advocationem* to I. S. if he neglect to take his turn *ea vice*, he is without remedy: but if my wife be before entitled to dower, and I die, then my heir shall have two presentments, and my wife the third, and my grantee shall have the fourth; and it doth not impugn this rule at all, because the grant shall receive that construction at the first, that it was intended such an avoidance as may be taken and enjoyed: as if I grant *proximam advocationem* to I. D. Dy. f. 35., and then grant *proximam advocationem* to I.

[1] *Qu.* the.

S. this shall be intended the next to the next, that is the next which I may lawfully grant or dispose.

But if I grant *proximam advocationem* to I. S. and I. N. is incumbent, and I grant by precise words, *illam advocationem, quam post mortem, resignationem, translationem, vel deprivationem I. N. immediate fore contigerit;* now this grant is merely void; because I had granted that before, and it cannot be taken against the words.

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## REGULA V.

*Necessitas inducit privilegium quoad jura privata.*

THE law chargeth no man with default where the act is compulsory and not voluntary, and where there is not a consent and election: and therefore, if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason as in presumption of law man's nature cannot overcome, such necessity carrieth a privilege in itself. Plow. f. 9.

Necessity is of three sorts: necessity of conservation of life; necessity of obedience; and necessity of the act of God, or a stranger.

First, for conservation of life:

If a man steal viands to satisfy his present hunger, this is no felony nor larceny. Stamf.

So if divers be in danger of drowning by the casting away of some boat or bark, and one of them get to some plank, or on the boat side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned; this is neither *se defendendo* nor by misadventure, but justifiable.

Plow. f. 13. b. per Brooke. 15 H. 7. f. 2. pl. 2. per Keble. 14 H. 7. f. 29, 30. per Read.

So if divers felons be in a gaol, and the gaol by casualty is set on fire, whereby the prisoners get forth; this is no escape, nor breaking of prison.

Reniger v. Fogassa, Plow. f. 1.

So upon the statute, that every merchant that setteth his merchandise on land without satisfying the customer or agreeing for it, (which agreement is construed to be in certainty,) shall forfeit his merchandise; and it is so that by tempest a great quantity of the merchandise is cast overboard, whereby the merchant agrees with the customer by estimation, which falleth out short of the truth; yet the over quantity is not forfeited, by reason of the necessity: where note, that necessity dispenseth with the direct letter of a statute law.

Lit. sec. 419. 12 H. 4. f. 20. pl. 5. 14 H. 4. f. 13. pl. 2. 38 H. 6. f. 11. pl. 22. 28 H. 6. f. 8. pl. 8. 39 H. 6. f. 50. pl. 16.

So if a man have right to land, and do not make his entry for terror of force, the law allows him a continual claim, which shall be as beneficial to him as an entry. So shall a man save his default of appearance by *cretine*[1] *d'eau*, and avoid his debt by *duresse*, whereof you shall find proper cases elsewhere.

Stamf. 26. 2 Ed. 3. Fitz. Tit. Coron. pl. 160.

The second necessity is of obedience: and therefore, where baron and feme commit a felony, the feme can neither be principal nor accessory; because the law intends her to have no will, in regard of the subjection and obedience she owes to her husband.

So one reason among others why ambassadors are used to be excused of practices against the state where they reside, except it be in point of conspiracy, (which

[1] This word, like most in law French, seems spelt anyhow. It means floods, and I suppose comes from *cresco*.

is against the law of nations and society,) is, because *non constat* whether they have it in *mandatis*, and then they are excused by necessity of obedience.

So if a warrant or precept come from the king to fell wood upon the ground whereof I am tenant for life or for years, I am excused in waste.

The third necessity is of the act of God, or of a stranger: as if I be particular tenant for years of a house, and it be overthrown by grand tempest, or thunder and lightning, or by sudden floods, or by invasion of enemies, or if I have belonging unto it some cottages which have been infected, whereby I can procure none to inhabit them, nor any workmen to repair them, and so they fall down: in all these cases I am excused in waste. But of this last learning, when and how the act of God and strangers do excuse, there be other particular rules.

43 Ed. 3. f. 6. 19 Ed. 3. 32 Ed. 3. 44 Ed. 3. f. 21. Fitz. Tit. Waste pl. 74. 80. 105. 78.

But then it is to be noted, that necessity privilegeth only *quoad jura privata;* for in all cases, if the act that should deliver a man out of the necessity[1] be against the commonwealth, necessity excuseth not: for *privilegium non valet contra rempublicam;* and, as another saith, *necessitas publica major est quam privata:* for death is the last and farthest point of particular necessity, and the law imposeth it upon every subject that he prefer the urgent service of his prince and country before the safety of his life. As if in danger of tempest those that are in the ship throw overboard other men's goods, they are not answerable; but if a man be commanded to bring ordnance or munition to relieve any of the king's towns that are distressed, then he cannot

[1] *i. e.* I suppose, *ex necessitate.*

for any danger of tempest justify the throwing them overboard: for there it holdeth which was spoken by the Roman, when they alleged the same necessity of weather to hold him from embarking, *necesse est ut eam, non ut vivam.* So in the case put before of husband and wife; if they join in committing treason, the necessity of obedience doth not excuse the offence as it doth in felony, because it is against the commonwealth.

13 H. 8. f. 16. per Shelly. So if a fire be taken in a street, I may justify the pulling down of the wall or house of another man to save the row from the spreading of the fire; but if I be assailed in my house, in a city or town, and be distressed, and to save my life I set fire on mine own house, which spreadeth and taketh hold on the other houses adjoining; this is not justifiable, but I am subject to their action upon the case, because I cannot rescue mine own life by doing anything against the commonwealth. But if it had been but a private trespass, as the going over another's ground, or the breaking of his inclosure when I am pursued, for the safeguard of my life, it is justifiable.

This rule admitteth an exception, when the law intendeth some fault or wrong in the party that hath brought himself into the necessity, so that it is *necessitas culpabilis.* This I take to be chief reason why *seipsum defendendo* is not matter of justification: because the law intends it hath a commencement upon an unlawful cause, because quarrels are not presumed

4 H. 7. f. 2. pl. 3. Stamford, f. 15. to grow without some wrongs either in words or deeds on either part; and the law, thinking it a thing hardly triable in whose default the affray or quarrel began, supposeth the party that kills another in his own defence not to be without mal-

ice; and therefore, as it doth not touch him in the highest degree, so it putteth him to sue out his pardon of course, and punisheth him by forfeiture of goods: for where there can be no malice nor wrong presumed, as where a man assails me to rob me, and I kill him that assaileth me, or if a woman kill him that assaileth her to ravish her, it is justifiable without any pardon.

So the common case proveth this excep- Stamf. f. 16. tion; that is, if a madman commit a felony, he shall not lose his life for it, because his infirmity came by the act of God; but if a drunken man commit a felony, he shall not be excused, because his imperfection came by his own default. For[1] the reason of loss and deprivation of will and election by necessity and by infirmity is all one; for the lack of *arbitrium solutum* is the matter: and therefore as *infirmitas culpabilis* excuseth not, no more doth *necessitas culpabilis*.

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## REGULA VI.

*Corporalis injuria non recipit æstimationem de futuro.*[2]

THE law, in many cases that concern lands or goods, doth deprive a man of his present remedy and turneth him over to some further circuit of remedy, rather than to suffer an inconvenience: but if it be question of personal pain, the law will not compel him to sustain it and expect remedy; because it holdeth no damages a sufficient recompense for a wrong which is corporal.

[1] Omitted in Camb. MS.

[2] The words *de futuro* are omitted in the Camb. MS. as is the contrast with the *lex talionis* applied *de præterito*, in the last paragraph of the rule.

As if the sheriff make a false return that I am summoned, whereby I lose my land; yet, because of the inconvenience of drawing all things to incertainty and delay if the sheriff's return should not be credited, I am excluded of my averment against it, and am put to mine action of deceit against the sheriff and summoners: but if the sheriff upon a *capias* return *cepi corpus, et quod est languidus in prisona*, there I may come in and falsify the return of the sheriff to save my imprisonment.

Long 5° Ed. 4. f. 93, 94, &c.

3. H. 6. f. 3. pl. 3.

So if a man menace me in my goods, as that he will burn certain evidences of my land which he hath in his hand, if I will not make unto him a bond; yet if I enter into bond by this terror, I cannot avoid it by plea, because the law holdeth it an inconvenience to avoid a specialty by such matter of averment; and therefore I am put to mine action against such a menacer: but if he restrain my person, or threaten me with battery, or with burning my house which is a safety and protection to my person, or with burning an instrument of manumission which is evidence of my enfranchisement; if upon such menace or duresse I make a deed, I shall avoid it by plea.

7 Ed. 4. f. 21. pl. 24.

So if a trespasser drive away my beasts over another's ground and I pursue them to rescue them, yet am I trespasser to the stranger upon whose ground I come: but if a man assail my person, and I fly over another's ground, now am I no trespasser.

This ground some of the canonists do aptly infer out of the saying of Christ: *Annon est corpus supra vestimentum?* where they say *vestimentum* comprehendeth all outward things appertaining to a man's condition,

as lands and goods, which, they say, are not in the same degree with that which is corporal; and[1] this was the reason of the ancient *lex talionis; oculus pro oculo, dens pro dente:* so that by that law *corporalis injuria de præterito non recipit æstimationem:* but our law, when the injury is already executed and inflicted, thinketh it best satisfaction to the party grieved to relieve him in damages, and to give him rather profit than revenge; but it will never force a man to tolerate a corporal hurt, and to depend upon that inferior kind of satisfaction, *ut in damagiis.*

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## REGULA VII.

*Excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus.*

In capital causes, *in favorem vitæ*, the law will not punish in so high a degree, except the malice of the will and intention do appear; but in civil trespasses and injuries that are of an inferior nature, the law doth rather consider the damage of the party wronged, than the malice of him that was the wrong-doer.

And therefore the law makes a difference between killing a man upon malice forethought, and upon a present heat: but if I give a man slanderous words, whereby I damnify him in his name and credit, it is not material whether I use them upon sudden choler and

[1] The Camb. MS. has only:

"But when the injury is already executed and inflicted, the law can do no more but relieve a man in damages; but it will never force him to tolerate a corporal hurt, and to depend upon that inferior kind of satisfaction."

provocation or of set malice; but in an action upon the case I shall render damages alike.

[1] So if a man be killed by misadventure, as by an arrow at butts, this hath a pardon of course: but if a man be hurt or maimed only, an action of trespass lieth, though it be done against the party's mind and will, and he shall be punished in the same as deeply as if he had done it of malice.

Stamf. 16. 6 E. 4. f. 7. pl. 18.

So if a surgeon authorised to practice do, through negligence in his cure, cause the party to die, the surgeon shall not be brought in question of his life; and yet if he do only hurt the wound, whereby the cure is cast back, and death ensues not, he is subject to an action upon the case for his misfeasance.

Stamf. 16 b.

So if baron and feme be, and they commit felony together, the feme is neither principal nor accessory, in regard of her obedience to the will of her husband: but if baron and feme join in committing a trespass upon land or otherwise, the action may be brought against them both.

So [2] if an infant within years of discretion, or a madman, kill another, he shall not be impeached thereof: but if he put out a man's eye, or do him like corporal hurt, he shall be punished in trespass.

3 H. 7. f. 1. pl. 4. Stamf. 16 b. 35 H. 6. f. 11. pl. 18.

So in felonies the law admitteth the difference of principal and accessory; and if the principal die, or be pardoned, the proceeding against the accessory faileth: but in trespass, if one command his man to beat you, and the servant after the battery die, yet your action of trespass stands good against the master.

Plow. f. 98.

[1] Omitted in Camb. MS.

[2] The rest of the rule is omitted in the Camb. MS.

## REGULA VIII.

*Æstimatio præteriti delicti ex post facto nunquam crescit.*

THE law construeth neither penal laws nor penal facts by intendments, but considereth the offence in degree as it standeth at the time when it is committed; so as if any circumstance or matter be subsequent, which laid together with the beginning should seem to draw to it a higher nature, yet the law doth not extend or amplify the offence.

Therefore if a man be wounded, and the percussor is voluntarily let go at large by the gaoler, and after death ensueth of the hurt; yet this is no felonious escape in the gaoler. 11 H. 4. f. 12. pl. 26.

So if the villain strike mortally the heir apparent of the lord, and the lord dieth before, and the person hurt who succeedeth to be lord to the villain dieth after; yet this is no petty treason.

So if a man compass and imagine the death of one that after cometh to be king of the land, not being any person mentioned within the statute of 25 Ed. III., this imagination precedent is not high treason.

So if a man use slanderous speeches of a person to whom some dignity after descends that maketh him a peer of the realm; yet he shall have but a simple action of the case, and not in the nature of *scandalum magnatum* upon the statute.

[1] So if John Stile steal sixpence from me in money, and the Queen by her proclamation doth raise monies, that the weight of silver in the piece now of six-

[1] Omitted in Camb. MS.

pence should go for twelve pence; yet this shall remain petty larceny, and no felony: and yet in all civil reckonings the alteration shall take place; as if I contract with a labourer to do some work for twelve pence, and the enhancing of money cometh before I pay him, I shall satisfy my contract with a sixpenny piece so raised.

So if a man deliver goods to one to keep, and after retain the same person into his service, who afterwards goeth away with his goods; this is no felony by the statute of 21 H. VIII., because he was not servant at that time.

[28 H. 8. pl. 2.]

[1] In like manner, if I deliver goods to the servant of I. S. to keep, and after die and make I. S. my executor; and, before any new commandment or notice of I. S. to his servant for the custody of the same goods, his servant goeth away with them; this is also out of the same statute.

But note that it is said *præteriti delicti:* for any accessory before the fact is subject to all the contingencies pregnant of the fact, if they be pursuances of the same fact; as if a man command or counsel one to rob a man or beat him grievously, and murder ensue; in either case he is accessory to the murder, *quia in criminalibus præstantur accidentia.*

Plow. f. 475.

[1] Omitted in Camb. MS.

## REGULA IX.

*Quod remedio destituitur ipsa re valet, si culpa absit.*[1]

THE benignity of the law is such as, when to preserve the principles and grounds of law it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse: for if it disable him to pursue his action, or to make his claim, sometimes it will give him the thing itself by operation of law without any act of his own; sometimes it will give him a more beneficial remedy.

[2] And therefore if the heir of the disseisor Lit. sec. 6 8. which is in by descent make a lease for life, the remainder for life unto the disseisee, and the lessee for life die; now the frank tenement is cast upon the disseisee by act in law, and thereby he is disabled to bring his *præcipe* to recover his right; whereupon the law judgeth him in of his ancient right as strongly as if it had been recovered and executed by action; which operation of law is by an ancient term and word of law called a *remitter*.

But if there may be assigned any default or laches in him, either in accepting the freehold or in accepting the interest that draws the freehold, then the law denieth him any such benefit.

[1] The Camb. MS. has: "*cui actio per legem citra culpam suam eripitur, ei benignitas legis largitur rem ipsam.*" Harl. MS. 6688. gives both forms of the maxims.

[2] The Camb. MS. omits all the cases of *remitter*, and the other cases down to that of the rent charge upon condition, and only has the observation: "This is the reason of a Remitter, because the law taketh away the action and suit which cannot be held against the party himself, and therefore the law without circumstance of recovery putteth him in of his best right."

And therefore if the heir of the disseisor make a lease for years, the remainder in fee to the disseisee; the disseisee is not remitted: and yet the remainder is in him without his own knowledge or assent; but, because the freehold is not cast upon him by act in law, no remitter.[1]

So if the heir of the disseisor infeoff the disseisee and
Lit. sec. 685. a stranger, and make livery to the stranger; although the stranger die before any agreement or taking of the profits by the disseisee, yet he is not remitted: because though a moiety be cast upon him by survivor, yet that is but *jus accrescendi*, and it is no casting of the freehold upon him by act in law, but he is still as an immediate purchaser; and therefore no remitter.

So if the husband be seised in the right of his wife, and discontinue and dieth, and the feme takes another husband, who takes a feoffment from the discontinuee to him and his wife; the feme is not remitted: and the reason is, because she was once sole, and so a laches in
Lit. sec. 666. her for not pursuing her right.[2] But if the feoffment taken back had been to the first husband and herself, she had been remitted.

Plow. f. 111. Yet if the husband discontinue the lands of the wife, and the discontinuee make a feoffment to

[1] The earliest edition has a *Quod nota*, and two of the best MS. leave out at the commencement the words, "the heir of;" all of which seems to point to some contemporary doubt about the position here maintained. I am not aware of any distinct authority for it, but it seems implied in Coke's reasoning on Litt. sec. 681., and of Littleton in sec. 682. The disseisee may disagree and it is his own laches to accept. The next marginal reference to Littleton I have retained, because, though it does not lay down Bacon's position, he may well have drawn the inference thence.

[2] A note in the first edition denies this to be law, agreeing with Coke in his note on Litt. sec. 671.

the use of the husband and wife, she is not remitted; but that is upon a special reason, upon the letter of the statute of 27 H. VIII. of uses, that willeth that the *cestuy que use* shall have the possession in quality, form, and degree, as he had the use. But that hold- Br. Tit. Remitter, pl. 49. eth place only upon the first vester of the use: Dy. f. 64. for when the use is once absolutely executed and vested, then it doth insue merely the nature of possessions; and if the discontinuee had made a feoffment in fee to the use of I. S. for life, the remainder to the use of baron and feme, and lessee for life die; now the feme is remitted, *causa qua supra.*

Also if the heir of the disseisor make a lease for life, the remainder to the disseisee, who chargeth the remainder, and lessee for life dies; the disseisee is not remitted: and the reason is, his intermeddling with the wrongful remainder, whereby he hath affirmed the same to be in him, and so accepted it. But if the heir of the disseisor had granted a rent charge to the disseisee, and afterwards made a lease for life, the remainder to the disseisee, and lessee for life had died, the disseisee had been remitted; because there appeareth no assent or acceptance of any estate in the freehold, but only of a collateral charge.

So if the feme be disseised, and intermarry [6 Ed. 3. f. 17. pl. 27.] with the disseisor, who makes a lease for life, rendering rent, and dieth leaving a son by the same feme, and the son accepts the rent of lessee for life, and then the feme dies, and the lessee for life dies; the son is not remitted: yet the frank tene- Dy. f. 30. pl. 207. ment was cast upon him by act in law; but because he had agreed to be in of the tortious reversion by acceptance of the rent, therefore no remitter.

So if tenant in tail discontinue, and the discontinuee make a lease for life, the remainder to the issue in tail being within age, and at full age the lessee for life surrendereth to the issue in tail, and tenant in tail die, and lessee for life die; yet the issue is not remitted: and yet if the issue had accepted a feoffment within age, and had continued the taking of the profits when he came of full age, and then the tenant in tail had died; notwithstanding his taking of the profits, he had been remitted. For that which guides the remitter is, if he be once in of the freehold without any laches: as if the heir of the disseisor enfeoffs the heir of the disseisee, who dies, and it descends to a second heir, upon whom the frank tenement is cast by descent, who enters and takes the profits, and then the disseisee dies; this is a remitter, *causa qua supra.*

Also if tenant in tail discontinue for life, and take a surrender of the lessee, now he is remitted and seised again by force of the tail; and yet he cometh in by his own act: but this case differeth from all the other cases; because the discontinuance was but particular at first, and the new gained reversion is but by intendment and necessity of law, and, therefore, is knit, as it were *ab initio*, with a limitation to determine, whensoever the particular discontinuance endeth and the estate cometh back to the ancient right.

Lit. sec. 626.

To proceed from cases of remitter, which is a great branch of this rule, to other cases:

If executors do redeem goods pledged by their testator with their own money, the law doth convert so much goods as doth amount to the value of that they lay forth to themselves in property; and upon a plea of fully administered it shall be allowed: and

Dy. f. 2.

the reason is, because it may be matter of necessity for the well administering of the goods of the testator and executing of their trust, that they disburse money of their own; for else perhaps the goods would have been forfeited, and he that had them in pledge would not accept other goods but money: and so it is a liberty which the law gives them; and then they can have no suit against themselves; and therefore the law gives them leave to retain so much goods by way of allowance.

And if there be two executors, and one of them pay the money; he may likewise retain against his companion, if he have notice thereof. But if there be an overplus of goods, above the value of that he hath disbursed, then ought he by his claim to determine which goods he doth elect to have in value; or else before such election if his companion do sell all the goods, he hath no remedy but in the spiritual court: for to say he should be tenant in common with himself and his companion *pro rata* of that he doth lay out, the law doth reject that course for intricateness. Dy. f. 187.

So if I. S. have a lease for years worth twenty pounds by the year, and grant unto I. D. a rent of ten pounds a year, and after make him his executor; now I. D. shall be charged with assets ten pounds only, and the other ten pounds shall be allowed and considered to him: and the reason is, because the not refusing shall be accounted no laches to him, because an executorship is *pium officium*, and matter of conscience and trust, and not like a purchase to a man's own use. [29 H. 8. pl. 7. in fine.]

Like law is, where the debtor makes the debtee his executor; the debt shall be considered in the assets, notwithstanding it be a thing in action. 12 H. 4. f. 21. Plow. f. 185.

Plow. f. 138 b. So if I have a rent charge, and grant it upon condition; now, though the condition be broken, the grantee's estate is not defeated till I have made my claim: but if after any such grant my father purchase the land, and it descend to me; now, if the condition be broken, the rent ceaseth without claim.[1] But if I had purchased the land myself, then I had extincted mine own condition, because I had disabled myself to [35 H. 6.] make my claim. And yet a condition collateral is not suspended by taking back estate; as if I make a feoffment in fee, upon condition that I. S. shall marry my daughter, and take a lease for life from my feoffee; if the feoffee break the condition I may claim to hold in by my fee-simple: but the case of the charge is otherwise; for if I have a rent charge issuing out of twenty acres, and grant that rent over upon condition, and purchase but one acre, the whole condition is extinct, and the possibility of the rent by the condition as fully destroyed as if the rent had been in me in *esse*.

Fitz. Tit. Grant 91. So if the King grant to me the wardship of the heir of I. S. when it falleth; because an action of covenant lieth not against the King, I shall have the thing itself in interest. But[2] if I let land to I. S. rendering a rent, with condition of re-entry, and I. S. be attainted, whereby the lease comes to the King; now my demand upon the land is gone which should give me benefit of re-entry, and yet I shall not have it reduced without demand: and the reason of difference is, because my condition in this case is not taken away in right, but only suspended by the priv-

[1] The rest of this paragraph is omitted in the Camb. MS.
[2] Omitted in Camb. MS.

ilege of the person: for if the King grant the lease over, the condition is revived as it was.

So if my tenant for life grant his estate to the King; now if I will grant my reversion over, the King is not compellable to atturn; therefore it shall pass by grant by deed without atturnment.

So if my tenant for life be, and I grant my [9 Ed. 2.] reversion *pur autre vie*, and the grantee die living *cestui que vie;* now the privity between tenant for life and me is not restored, and I have no tenant in *esse* to atturn; therefore I may pass my reversion without atturnment.

So if I have a nomination to a church, Dy. f. 48. pl and another hath the presentation, and the 17. presentation comes to the King; now because the King cannot be attendant, my nomination is turned to an absolute patronage.

So if a man be seised of an advowson, and See 7 Rep. 8 a. take a wife, and after title of dower given he join in impropriating the church, and dieth; now because the feme cannot have the third turn because of the perpetual incumbency, she shall have all the turns during her life: for[1] it shall not be disimpropriated to the benefit of the heir contrary to the grant of tenant in fee-simple.

But if a man grant the third presentment to I. S. and his heirs, and impropriate the advowson; now the grantee is without remedy, for he took his grant subject to that mischief at the first: and, therefore it was his laches, and therefore not like the case of the dower. And this grant of the third avoidance is not like *tertia*

[1] This explanation is omitted in Camb. MS.: as is the whole of the next case.

*pars advocationis*, or *medietas advocationis*, upon a tenancy in common of the advowson: for if two tenants in common be, and an usurpation be had against them, and the usurper do impropriate, and one of the tenants in common do release, and the other bring his writ of right *de medietate advocationis*, and recover; now I take the law to be that, because tenants in common ought to join in presentments, which cannot now be, he shall have the whole patronage. For neither can there be an apportionment, that he should present all the turns and his incumbent but to have a moiety of the profits, nor yet the act of impropriation shall not be defeated: but as, if two tenants in common be of a ward, and they join in a writ of right of ward, and one release, the other shall recover the entire ward, because it cannot be divided; so shall it be in the other case, though it be of inheritance, and though he bring his action alone.

45 Ed. 3. f 10. pl. 2.

Also if a disseisor be disseised, and the first disseisee release to the second disseisor upon condition, and a descent be cast, and the condition broken; now the mesne disseisor, whose right is revived, shall enter notwithstanding this descent, because his right was taken away by the act of a stranger.

But[1] if I. S. devise land by the statute of 32 H. VIII. and the heir of the devisor enters and makes a feoffment in fee, and feoffee dieth seised; this descent bindeth, and there shall not be a perpetual liberty of entry upon the reason that he never had seisin where-

[1] In the Camb. MS. these cases of the devisee and patentee are introduced at the end of the Rule, with the introductory observation: "Note also, if it be not *citra culpam suam*, but that there be laches in the party, then the law useth no such indulgence to him." As to the point, see Co. Litt. 240 *b.*, and Butler's note.

upon he might ground his action; but he is at a mischief by his own laches. And the like law of the Queen's patentee: for I see no reasonable difference between them and him in the remainder, which is Littleton's case.

But note, that the law by operation and matter in fact will never countervail and supply a title grounded upon a matter of record; and therefore if I be entitled unto a writ of error, and the land descend unto me, I shall never be remitted; no more shall I be unto an attaint, except I may also have a writ of right.

So if upon my avowry for services my tenant disclaim, where I may have a writ of right as upon disclaimer; if the land after descend to me, I shall never be remitted. Dy. f. 5. pl. 1.

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## REGULA X.[1]

*Verba generalia restringuntur ad habilitatem rei vel personæ.*

It is a rule that the King's grants shall not be taken or construed to a special intent; it is not so with the grants of a common person, for they shall be extended as well to a foreign intent as to a common intent; yet with this exception, that they shall never be taken to an impertinent or a repugnant intent: for all words, whether they be in deeds or statutes or otherwise, if they be general and not express and precise, shall be restrained unto the fitness of the matter and the person.

As if I grant common *in omnibus terris* Perk. pl. 108

[1] Omitted in Camb. MS.

*meis* in D. and I have in D. both open grounds and several; it shall not be stretched to common in my several, much less in my garden or orchard.

14 H. 8. f. 2. pl. 1. So if I grant to a man *omnes arbores meas crescentes supra terras meas in* D. he shall not have apple-trees nor other fruit-trees growing in my gardens or orchards, if there be any other trees upon my grounds.

41 Ed. 3. f. 6. 19. pl. 14. 3. So if I grant to I. S. an annuity of ten pounds a year *pro consilio impenso et impendendo;* if I. S. be a physician, it shall be understood of his counsel in physic; and if he be a lawyer, of his counsel in law.

So if I do let a tenement to I. S. near by my dwelling-house in a borough, provided that he shall not erect or use any shop in the same without my license, and afterwards I license him to erect a shop, and I. S. is then a milliner; he shall not, by virtue of these general words, erect a joiner's shop.

Dy. f. 337. pl. 88. So the statute of chantries, that willeth all lands to be forfeited that were given or employed to a superstitious use, shall not be construed of the glebe lands of parsonages: nay farther, if lands be given to the parson and his successors of D. to say a mass in his church of D. this is out of the statute, because it shall be intended but as augmentation of his glebe: but otherwise had it been, if it had been to say a mass in another church than his own.

Stat. Westm. 1. cap. 4. So the statute of wrecks, that willeth that goods wrecked, where any live domestical creature remains in the vessel, shall be preserved and kept to the use of the owner that shall make his claim by the space of one year, doth not extend to fresh vict-

uals or the like, which is impossible to keep without perishing or destroying it: for in these and the like cases general words may be taken, as was said, to a rare or foreign intent, but never to an unreasonable intent.

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## REGULA XI.

*Jura sanguinis nullo jure civili dirimi possunt.*

THEY be the very words of the civil law, which cannot be amended.

To explain this rule: *Hæres est nomen juris, filius est nomen naturæ;* therefore corruption of blood taketh away the privity of the one, that is of the heir, but not of other, that is of the son: therefore if a man be attainted and be murdered by a stranger the eldest son shall not have appeal, because the appeal is given to the heir; for the youngest sons who are equal in blood shall not have it: but if an attainted person be killed by his son, this is petty treason, for that the privity of a son remaineth. For[1] I admit the law to be that if the son kill his father or mother it is petty treason, and that there remaineth in our laws so much of the ancient footsteps of *potestas patria* and natural obedience; which by the law of God is the very instance itself, and all other government and obedience is taken but by equity: which I add because some have sought to weaken the law in that point.

35 H. 6. f. 57, 58.

Lamb. Jus. f. 245.

So if land descend to the eldest son of a person attainted from an ancestor of the mother held in knight's

[1] This paragraph is not in Camb. MS.

service, the guardian shall enter, and oust the father; because the law giveth the father that prerogative in respect he is his son and heir; for of a daughter or a special heir in tail he shall not have it: but if the son be attainted, and the father covenant in consideration of natural love to stand seised of land to his use, this is good enough to raise an use; because the privity of natural affection remaineth.

F. N. Br. fo. 147. L. O. R.

So if a man be attainted, and have charter of pardon, and be returned of a jury between his son and I. S. the challenge remaineth: so may he maintain any suit of his son, notwithstanding the blood be corrupted.

So[1] by the statute of 21 H. VIII. c. 5. the ordinary ought to commit the administration of his goods, that was attainted and purchased his charter of pardon, to his children though born before the pardon: for it is no question of inheritance; for if one brother of the half blood die, the administration ought to be committed to the other brother of the half blood, if there be no nearer by the father.

Bro. Tit. Adm. pl. 47.

So if the uncle by the mother be attainted, and pardoned, and land descend from the father to the son within age held in socage, the uncle shall be guardian in socage: for that savoureth so little of the privity of heir, as the possibility to inherit shutteth out.

But if a feme tenant in tail assent to the ravisher, and have no issue, and her cousin is attainted, and pardoned, and purchaseth the reversion, he shall not enter for a forfeiture: for though the law giveth it not in point of inheritance, but only as a perquisite to any of the blood, so he be next in estate, yet the recompense is understood for the stain of his blood, which can-

[1] This and the two following cases are omitted in Camb. MS.

not be considered when it is once wholly corrupted before.

So if a villain be attainted, yet the lord shall have the issues of his villain born before or after the attainder; for the lord hath them *jure naturæ* but as the increase of a flock.

*Query*, Whether, if the eldest son be attainted and pardoned, the lord shall have aid of his tenants to make him knight? And it seemeth he shall; for the words of the writ are *filium primogenitum*, and not *filium et hæredem;* and the like writ lieth *pur file marrier*, who is no heir. Fitz. N. B. f. 82. [Register, fol. 87.]

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## REGULA XII.

*Receditur à placitis juris potius quàm injuriæ et delicta maneant impunita.*

THE law hath many grounds and positive learnings, which are[1] not of the maxims and conclusions of reason, but yet are learnings received, which the law hath set down and will not have called in question: these may be rather called *placita juris* than *regulæ juris*. With such maxims the law will dispense, rather than crimes and wrongs should be unpunished; *quia salus populi suprema lex*, and *salus populi* is contained in the repressing offences by punishment.

Therefore if an advowson be granted to two and the heirs of one of them, and an usurpation be had, they both shall join in a writ of Fitz. N. B. 30. B. F.

[1] The Camb. MS. has: "not of the highest rules of reason, which are *legum leges*, such as we have here collected."

right of advowson; and yet it is a ground in law, that a writ of right lieth of no less estate than of a fee-simple: but because the tenant for life hath no other several action in the law given him; and also that the jointure is not broken, and so the tenant in fee-simple cannot bring his writ of right alone; therefore rather than he shall be deprived wholly of remedy, and this wrong unpunished, he shall join his companion with him, notwithstanding the feebleness of his estate.

6 Ed. 3. f. 21. But if lands be given to two and to the heirs of one of them, and they lease in a *præcipe* by default; now they shall not join in a writ of right, because the tenant for life hath a several action, namely, a *Quod ei deforciat*, in which respect the jointure is broken.

27 H. 8. f. 13. pl. 36. So if tenant for life and his lessor join in a lease for years, and the lessee commit waste, they shall join in punishing this waste, and *locus vastatus* shall go to the tenant for life and the damages to him in the reversion; and yet an action of waste lieth not for tenant for life: but because he in the reversion cannot have it alone, because of the mesne estate for life, therefore rather than the waste shall be unpunished, they shall join.

So[1] if two coparceners be, and they lease the land, and[2] the lessee commit waste, and one of them die, and hath issue; the aunt and the issue shall join in punishing this waste, and the issue shall recover the moiety of the place wasted, and the aunt the other moiety and the entire damages: and yet *actia injuriarum moritur*

[1] This and the following case are omitted in the Camb. MS.

[2] I have transposed these words, which in all the editions and MSS. I have seen stand after "and hath issue;" the sense and the authorities require the change. Fitz. N. B. fo. 60. R.

*cum persona;* but *in favorabilibus magis attenditur quod prodest, quàm quod nocet.*

So if a man recovers by erroneous judgment, and hath issue two daughters, and one of them is attainted; the writ of error shall be brought against both parceners notwithstanding the privity fail in the one. 20 Ed. 2. Fitz. Tit. Descent, pl. 16.

Also it is a positive ground, that the accessory in felony cannot be proceeded against until the principal be tried; yet if a man upon subtlety and malice set a madman by some device upon another to kill him, and he doth so; now forasmuch as the madman is excused, because he can have no will nor malice, the law accounteth the inciter as principal, though he be absent, rather than the crime shall go unpunished. [33 Eliz.]

So[1] it is a ground in the law, that the appeal of murder goeth not to the heir where the party murdered hath a wife, nor to the younger brother where there is an elder; yet if the wife murder her husband, because she is the party offender the appeal leaps over to the heir; and so if the son and heir murder his father, it goeth to the second brother. Fitz. Tit. Corone, pl. 459. Stamf. f. 60.

But if the rule be one of the higher sort of maxims, that are *regulæ rationales* and not *positivæ*, then the law will rather endure a particular offence to escape without punishment than violate such a rule.

As[2] it is a rule that penal statutes shall not be taken by equity, and the statute of Stamf. cap. 12. f. 125.

[1] Omitted in Camb. MS.

[2] For all this paragraph the Camb. MS. has: "Therefore, whereas it is a rule that the penal statutes shall not be taken by equity, if the law be that, for such an offence, a man shall lose his right hand" (and so on as in the text to "extended"): and then adds: "So it is very usual in penal statutes, which have sometimes omitted cases more heinous in the same kind

1 Ed. VI. cap. 12 enacts that those that are attainted for stealing of horses shall not have their clergy, the judges conceived that this did not extend to him that stole but one horse, and therefore procured a new act for it, 2 Ed. VI. cap. 33. And they had reason for it, as I take the law. For it is not like the case upon the statute of Glocest. that gives an action of waste against him that holds *pro termino vitæ vel annorum.* It is true, if a man hold but for a year he is within the statute. For it is to be noted, that penal statutes are taken strictly and literally only in the point of defining and setting down the fact and the punishment, and in those clauses that concern them, and not generally in words that are but circumstances and conveyance in the putting of the case. And so see the diversity; for if the law be, that for such an offence a man shall lose his right hand, and the offender hath had his right hand cut off in the wars before, he shall not lose his left hand, but the crime shall rather pass without the punishment which the law assigned, than the letter of the law shall be extended. But if the statute of 1 Ed. VI. had been, that he that should steal a horse should be ousted of his clergy, then there had been no question at all but, if a man had stolen more horses than one, he had been within the statute; *quia omne majus continet in se minus.*

Plow. f. 467. Litt. sec. 67. 46 Ed. 3. f. 31. pl. 32.

than they have provision for, and yet it hath been requisite to make new statutes and not to exceed the letter of the old."

## REGULA XIII.[1]

*Non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram.*

THOUGH falsity of addition or demonstration doth not hurt where you give a thing a proper name; yet nevertheless if it stand doubtful upon the words, whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former name, the law will never intend error or falsehood.

And therefore, if the parish of Hurst do extend into the counties of Wiltshire and Berkshire, and I grant my close called Callis, situate and lying in the parish of Hurst in the county of Wiltshire; and the truth is that the whole close lieth in the county of Berkshire; yet the law is that it passeth well enough, because there is a certainty sufficient in that I have given it a proper name which the false reference doth not destroy; and not upon the reason that these words, "in the county of Wiltshire," shall be taken to go to the parish only, and so to be true in some sort, and not to the close, and so to be false: for if I had granted *omnes terras meas in parochia de Hurst in com. Wiltshire*, and I had no lands in Wiltshire but in Berkshire, nothing had past. But in the principal [18 Eliz.] case, if the close called Callis had extended part into Wiltshire and part into Berkshire, then only that part had passed which lay in Wiltshire.

Dy. f. 292. pl. 72.

So if I grant *omnes et singulas terras meas* [29 Reg.] *in tenura I. D. quas perquisivi de I. N. in indentura*

[1] Omitted in Camb. MS.

*dimissionis fact' I. B. specificat' :* if I have land wherein some of these references are true and the rest false, and no land wherein they are all true, nothing passeth: as if I have land in the tenure of I. D. and purchased of I. N. but not specified in the indenture to I. B. or if I have land which I purchased of I. N. and specified in the indenture of demise to I. B. and not in the tenure of I. D.: but if I have some land wherein all these demonstrations are true, and some wherein part of them are true and part false, then shall they be intended words of true limitation to pass only those lands wherein all those circumstances are true.

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## REGULA XIV.[1]

*Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens quæ sortiatur effectum interveniente novo actu.*

THE law doth not allow of grants except there be a foundation of an interest in the grantor: for the law, — that will not accept of grants of titles or of things in action, which are imperfect interests, — much less will it allow a man to grant or incumber that which is no interest at all, but merely future. But of declarations precedent before any interest vested the law doth allow; but with this difference, so that there be some new act or conveyance to give life and vigour to the declaration precedent.

Now the best rule of distinction between grants and declarations is, that grants are never countermandable

[1] Omitted in Camb. MS.

—not in respect of the nature of the conveyance or instrument, though sometime in respect of the interest granted they are: whereas declarations are evermore countermandable in their natures.

And therefore if I grant unto you that, if you enter into an obligation to me of one hundred pounds and after do procure me such a lease, that then the same obligation shall be void; and you enter into such an obligation unto me, and afterwards do procure such a lease: yet the obligation is simple, because the defeasance was made of that which was not. [20 Eliz.] 19 H. 6. f. 62.

So if I grant unto you a rent charge out of white acre, and that it shall be lawful for you to distrain in all my other lands whereof I am now seised and which I shall hereafter purchase; although this be but a liberty of distress, and no rent save only out of white acre, yet as to the lands afterwards to be purchased the clause is void. [27 Ed. 3.]

So if a reversion be granted to I. S., and I. D. a stranger by his deed do grant to I. S. that, if he purchase the particular estate, he doth atturne to the grant; this is a void atturnment, notwithstanding he doth afterwards purchase the particular estate. [24 Eliz.]

But of declarations the law is contrary: as if the disseisee make a charter of feoffment to I. S. and a letter of attorney to enter and make livery of seisin, and deliver the deed of feoffment, and afterwards livery of seisin is made accordingly; this is a good feoffment: and yet he had nothing other than in right at the time of the delivery of the charter; but because a deed of feoffment is but matter of declaration and evidence, and there is a new act which is [13, 14 Eliz. 20, 21 Eliz. 25 Eliz.]

[M. 38. et 39 Eliz.] the livery subsequent, therefore it is good in law.

[37 Eliz. Dacre's case.] So if a man make a feoffment to I. S. upon condition to enfeoff I. N. within certain days, and there are deeds made both of the first feoffment and the second, and letters of attorney according, and both these deeds of feoffment and letters of attorney are delivered at a time, so that the second deed of feoffment and letter of attorney are delivered when the first feoffee hath nothing in the land; yet if both liveries be made according, all is good.

So if I covenant with I. S. by indenture, that before such a day I will purchase the manor of D. and before the same day I will levy a fine of the same land, and that the same fine shall be to certain uses which I express in the same indenture; this indenture to lead uses, being but matter of declaration and countermandable at my pleasure, will suffice, though the land be purchased after; because there is a new act to be done, namely the fine.

[25 Eliz. 37 Eliz.] But if there were no new act, then otherwise it is: as if I covenant with my son in consideration of natural love to stand seised to his use of the lands which I shall afterwards purchase, and I do afterwards purchase; yet the use is void: and the reason is, because there is no new act, nor transmutation of possession following, to perfect this inception; for the use must be limited by the feoffor, and not by the feoffee, and he had nothing at the time of the covenant.

Brett v. Rigden. Plow. f. 340. So if I devise the manor of D. by special name, of which at that time I am not seised, and after I purchase it; except I make some new pub-

lication of my will, this devise is void: and the reason is, because that my death, which is the consummation of my will, is the act of God, and not my act; and therefore no such act as the law requireth.

But if I grant unto I. S. authority by my deed to demise for years the land whereof I am now seised or hereafter shall be seised; and after I purchase lands, and I. S. my attorney doth demise them; this is a good demise: because the demise of my attorney is a new act, and all one with a demise by myself.

But if I mortgage land, and after covenant [21 Eliz.] with I. S. in consideration of money which I receive of him, that after I have entered for the condition broken I will stand seised to the use of the same I. S. and I enter, and this deed is enrolled, and all within the six months; yet nothing passeth; because this enrolment is no new act, but a perfective ceremony of the first deed of bargain and sale. And the law is more strong in that case, because of the vehement relation which the enrolment hath to the time of the bargain and sale, at what time he had nothing but a naked condition.

So if two joint tenants be, and one of them bargain and sell the whole land, and before the enrolment his companion dieth; nothing passeth of the moiety accrued unto him by survivor. Bro. Tit. Faits Enroll. pl. 9.

## REGULA XV.

*In criminalibus sufficit generalis malitia intentionis cum facto paris gradus.*

ALL crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact; which though it be not the fact at which the intention of the malefactor levelled, yet the law giveth him no advantage of that error if another particular ensue of as high a nature.

Sander's case. Plow. f. 474. Therefore if an impoisoned apple be laid in a place to poison I. S., and I. D. cometh by chance and eateth it; this is murder in the principal that is actor: and yet the malice *in individuo* was not against I. D.

So if a thief find the door open, and come in the night and rob a house, and be taken with the manner, and break a door to escape; this is burglary: yet the breaking of the door was without any felonious intent; but it is one entire act.

So if a caliver be discharged with a murderous intent at I. S. and the piece break and strike into the eye of him that dischargeth it, and killeth him, he is *felo de se;* and yet his intention was not to hurt himself: for *felonia de se* and murder are *crimina paris gradus.* For if a man persuade another to kill himself, and be present when he doth so, he is a murderer.

But *quære*, if I. S. lay impoisoned fruit for some other stranger his enemy, and his father or mother come and eat it, whether this be petty treason; because it is not altogether *crimen paris gradus.*

## REGULA XVI.

*Mandata licita recipiunt strictam interpretationem, sed illicita latam et extensam.*

In the committing of lawful authority to another, a man may limit it as strictly as it pleaseth him; and if the party authorised do transgress his authority, though it be but in circumstance expressed, it shall be void in the whole act. But when a man is author and mover to another to commit an unlawful act, then he shall not excuse himself by circumstance not pursued.

Therefore if I make a letter of attorney to I. S. to deliver livery of seisin in the capital messuage, and he doth it in another place of the land; or between the hours of two and three, and he doth it after or before; or if I make a charter of feoffment to I. D. and I. B. and express the seisin to be delivered to I. D. and my attorney deliver it to I. B.; in all these cases the act of the attorney, as to execute the estate, is void: but if I say generally to I. D. whom I mean only to enfeoff, and my attorney make it to his attorney, it shall be intended; for it is a livery to him in law. Dy. f. 337. pl. 37. Dy. f. 283. pl 30. Dy. f. 62.

But on the other side, if a man command I. S. to rob I. D. on Shooters-hill, and he doth it on Gads-hill; or to rob him such a day, and he doth it the next day; or to kill I. D. and he doth it not himself but procureth I. B. to do it; or to kill him by poison, and he doth it by violence; in all these cases, notwithstanding the fact be not executed in circumstance, yet he is accessory nevertheless. Sander's case, Plow. f. 475.

But if it be to kill I. S. and he killeth I. Ibidem.

D. mistaking him for I. S. then the acts are distinct in substance, and he is not accessory.

And be it that the acts be of differing degrees, and yet of a kind; as if a man bid I. S. to pilfer away such a thing out of a house, and precisely restrain him to do it some time when he is gotten in without breaking of the house, and yet he breaketh the house; yet he is accessory to the burglary: for a man cannot condition with an unlawful act, but he must at his peril take heed how he putteth himself into another man's hands.

Ibidem. But if a man bid one rob I. S. as he goeth to Sturbridge-fair, and he rob him in his house; the variance seemeth to be of substance, and he is not accessory.

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## REGULA XVII.[1]

*De fide et officio judicis non recipitur quæstio, sed de scientia, sive error sit juris sive facti.*

THE law doth so much respect the certainty of judgments and the credit and authority of judges, as it will not permit any error to be assigned that impeacheth them in their trust and office and in wilful abuse of the same; but only in ignorance, and mistaking either of the law or of the case and matter in fact.

F. N. B. fo. 21. B. 7 H. 7. f. 4. pl. 4. And therefore if I will assign for error, that whereas the verdict passed for me, the court received it contrary, and so gave judgment against me; this shall not be accepted.

So if I will allege for error, that whereas I offered to

[1] Omitted in Camb. MS.

plead a sufficient bar, the court refused it, and drave me from it; this error shall not be allowed.

But the great doubt is, where the court doth determine of the verity of the matter in fact, so that it is rather a point of trial than a point of judgment; whether it shall be re-examined in error.

As if an appeal of mayhem be brought, and the court, by the assistance of chirurgeons, adjudge it to be a maim; whether the party grieved may bring a writ of error: and I hold the law to be he cannot. [1 Mar. 5.] 28 Ass. pl. 5. 21 H. 7. f. 40. pl. 58. and f. 33. pl. 30.

So if one of the prothonotaries of the Common Pleas bring an assize of his office, and allege fees belonging to the same office in certainty, and issue be taken upon these fees; this issue shall be tried by the judges by way of examination; and if they determine it for the plaintiff, and he have judgment to recover arrerages according, the defendant can bring no writ of error of this judgment, though the fees in truth be other.

So if a woman bring a writ of dower, and the tenant plead her husband was alive, this shall be tried by proofs and not by jury; and upon judgment given on either side no error lies. 8 H. 6. f. 23. pl. 7. Dy. f. 185. 43 Ass. pl. 26. 41 Ass. pl. 5. 39 Ass. pl. 9.

So if *nul tiel record* be pleaded, which is to be tried by the inspection of the record, and judgment be thereupon given; no error lieth. 5 Ed. 4. f. 3. pl. 25.

So if in an assize the tenant saith, he is *Count de Dale et nient nosme Count* in the writ; this shall be tried by the records of the Chancery, and upon judgment given no error lieth. 22 Ass. pl. 24.

So if a felon demand his clergy, and read well and

distinctly, and the court who is judge thereof do put him from his clergy wrongfully, error shall never be brought upon this attainder.

So if upon judgment given upon confession or default the court do assess damages; the defendant shall never bring a writ of error, though the damages be outrageous.

And it seemeth in the case of maim and some other cases, that the court may dismiss themselves of discussing the matter by examination, and put it to a jury, and then the party grieved shall have his attaint; and therefore that the court, that doth deprive a man of his action, should be subject to an action: but, that notwithstanding, the law will not have, as was said in the beginning, the judges called in question in the point of their office when they undertake to discuss the issue. And that is the true reason: for to say that the reason of these cases should be, because trial by the court shall be peremptory as trial by certificate, (as by the bishop in case of bastardy, or by the marshal of the king, &c.); the cases are nothing like; for the reason of those cases of certificate is, because if the court should not give credit to the certificate, but should re-examine it, they have no other mean but to write again to the same lord bishop, or the same lord marshal; which were frivolous, because it is not to be presumed they would differ from their own former certificate; whereas in these other cases of error the matter is drawn before a superior court, to re-examine the errors of an inferior court: and therefore the true reason is, as was said, that to examine again that which the court had tried were in substance to attaint the court.

41 Ass. pl. 29. 7 H. 6. f. 37. pl. 44.

And therefore this is a certain rule in error: that error in law is ever of such matters as do appear upon record; and error in fact is ever of such matters as are not crossed by the record; as, to allege the death of the tenant at the time of the judgment given, nothing appeareth to the contrary upon the record.

So when an infant levies a fine; it appeareth not upon the record that he is an infant; and therefore it is an error in fact, and shall be tried by inspection during nonage.

But if a writ of error be brought in the King's Bench of a fine levied by an infant, and the court by inspection and examination doth affirm the fine; the infant, though it be during his infancy, shall never bring a writ of error in parliament upon this judgment: not but that error lies after error; but because it doth now appear upon the record that he is of full age, therefore it can be no error in fact. And therefore if a man will assign for error in fact, that whereas the judges gave judgment for him, the clerks entered it in the roll against him: this error shall not be allowed: and yet it doth not touch the judges but the clerks; but the reason is, if it be an error, it is an error in fact; and you shall never allege an error in fact contrary to the record.

2 R. 3. f. 20. pl. 49.

9 Ed. 4. f. 8. pl. 12. F. N. Br. f. 21. B.

## REGULA XVIII.

*Persona conjuncta æquiparatur interesse proprio.*

THE law hath that respect of nature and conjunction of blood, as in divers cases it compareth and matcheth nearness of blood with consideration of profit and interest; yea, and some cases alloweth of it more strongly. Plow. f. 303. Therefore if a man covenant, in consideration of blood, to stand seised to the use of his brother, or son, or near kinsman, an use is well raised by his covenant without transmutation of possession. Nevertheless it is true, that consideration of blood is naught[1] to ground a personal contract upon: as if I contract with my son, that in consideration of blood I will give unto him such a sum of money, this is a *nudum pactum*, and no *assumpsit* lieth upon it: [2]for to subject me to an action, there needeth a consideration of benefit; but the use the law raiseth without suit or action. And besides, the law doth match real considerations with real agreements and covenants.

19 Ed. 4. f. 35. pl. 9. 14. H. 6. f. 6. pl. 30. So if suit be commenced against me, my son or brother may maintain, as well as he in remainder for his interest, or a lawyer for his fee. So[3] if my brother have a suit against my nephew or cousin, it is at my election to maintain the cause of

[1] All the MSS. and early editions I know of have "not." The emendation, which I suppose to be conjectural, appears in the edition of 1778.

[2] For the rest of this paragraph the Camb. MS. has: "the reason whereof may partly be, because in contracts the mutual consideration must execute in both parties at the time, and partly because in contracts of things merely personal the law will not look further than the person; but doth match interests personal with considerations personal, and interests of continuance, as uses of lands, with considerations of continuance, as considerations of blood."

[3] Omitted in Camb. MS.

my nephew or cousin, though the adverse party be nearer unto me in blood.

So in challenges of juries, challenge of blood is as good as challenge within distress,[1] and it is not material how far off the kindred be, so the pedigree can be conveyed in certainty, whether it be of the half blood or whole. 14 H. 7. f. 2. pl. 6. Plow. 425.

So if a man menace me, that he will imprison or hurt in body my father or my child except I make unto him such an obligation, I shall avoid this duresse, as well as if the duresse had been to mine own person: and yet if a man menace me with the taking away or destruction of my goods, this is no good duresse to plead: and the reason is, because the law can make me reparation of that loss, and so can it not of the other. 39 H. 6. f. 51. 7. Ed. 4. f. 21. pl. 24. 20 Ass. pl. 14.

So if a man under the years of twenty-one contract for the nursing of his lawful child, this contract is good and shall not be avoided by infancy, no more than if he had contracted for his own aliments or erudition. [Perk. 4. D. cap. 28]

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## REGULA XIX.

*Non impedit clausula derogatoria, quo minùs ab eadem potestate res dissolvantur, à quibus*[2] *constituuntur.*

Acts which are in their nature revocable cannot by strength of words be fixed and perpetuated. Yet men

[1] For the phrase see Co. Litt. 157 b. The rest of the paragraph is omitted in Camb. MS.

[2] See note, p. 188.

have put in ure two means to bind themselves from changing or dissolving that which they have set down; whereof the one is *clausula derogatoria*, the other *interpositio juramenti;* whereof the former is only pertinent to the present purpose.

This *clausula derogatoria* is by the common practical term called *clausula non obstante*, and is of two sorts, *de preterito* and *de futuro;* the one weakening and disannulling any matter past to the contrary, the other any matter to come: and this latter is that only whereof we speak.

This *clausula non obstante de futuro* the law judgeth to be idle and of no force; because it doth deprive men of that which of all other things is most incident to human condition; and that is alteration or repentance.

Therefore if I make my will, and in the end thereof do add such like clause, "Also my will is, if I shall revoke this present will, or declare any new will, except the same shall be in writing, subscribed with the hands of two witnesses, that such revocation or new declaration shall be utterly void; and by these presents I do declare the same not to be my will, but this my former will to stand, any such pretended will to the contrary notwithstanding;" yet nevertheless this clause, or any the like never so exactly penned, and although it do restrain the revocation but in circumstance and not altogether, is of no force or efficacy to fortify the former will against the second; but I may by parole without writing repeal the same will and make a new.

28 Ed. 3. c. 7. 42 Ed. 3. c. 9. So if there be a statute made "that no sheriff shall continue in his office above a year, and if any patent be made to the contrary it

shall be void; and if there be any *clausula non obstante* contained in such patent to dispense with the present act, that such clause also shall be void;" yet nevertheless a patent of a sheriff's office made by the king for term of life, with a *non obstante*, will be good in law, contrary to such statute which pretendeth to exclude *non obstantes*: and the reason is, because it is an inseparable prerogative of the crown to dispense with politic statutes, and of that kind; and then the derogatory clause hurteth not. Br. Tit. Pat. pl. 109.

So if an act of parliament be made wherein there is a clause contained, that it shall not be lawful for the king, by authority of parliament, during the space of seven years, to repeal and determine the same act; this is a void clause, and the same act may be repealed within the years. And yet if the parliament should enact in the nature of the ancient *lex regia*, that there should be no more parliaments held, but that the king should have the authority of the parliament;[1] this act were good in law; *quia potestas suprema seipsum dissolvere potest, ligare non potest*: for as it is in the power of man to kill a man, but it is not in his power to save him alive and to restrain him from breathing or feeling; so it is in the power of parliament to extinguish

[1] The Camb. MS. adds: "or, *è converso*, if the King by Parliament were to enact to alter the state, and to translate it from a monarchy to any other form; both these acts were good." It is, I think, not unimportant to observe, that this subsequently cancelled position stands in this MS. along with the immediately preceding one recognising an "inseparable prerogative" of the crown to dispense with a certain ill-defined class of statutes. It seems clear that this prerogative is conceived of as merely an "inseparable" part of the actual constitution of the realm, to be ascertained and defined by the regular tribunals, and not, as was maintained by some at that or a later day, derived from a source transcending all constitutions, into which it was profanity for a court to enquire.

or transfer their own authority, but not, whilst the authority remains entire, to restrain the functions and exercises of the same authority.

So in 28 of K. H. VIII. chap. 17. there was a statute made, that all acts that passed in the minority of kings, reckoning the same under years of twenty-four, might be annulled and revoked by their letters patents when they came to the same years; but this act in the Dy. f. 313. first of K. Ed. VI. (who was then between the years of ten and eleven,) cap. 11. was repealed, and a new law surrogate in place thereof; wherein a more reasonable liberty was given, and wherein, though other laws are made revocable according to the provision of the former law with some new form prescribed, yet that very law of revocation, together with pardons, is made irrevocable and perpetual. So that there is a direct contrariety and repugnancy between these two laws: for if the former stands, which maketh all latter laws during the minority of kings revocable without exception of any law whatsoever, then that very law of repeal is concluded in the generality, and so itself made revocable; on the other side that law, making no doubt of the absolute repeal of the first law, though itself were made during the minority, which was the very case of the former law, in the new provision which it maketh hath a precise exception, that the law of repeal shall not be repealed. But the law is, that the first law by the impertinency of it was void *ab initio et ipso facto* without repeal: as if a law were made, that no new statute should be made during seven years, and the same statute be repealed within the seven years; if the first statute should be good, then no repeal could be made thereof within that time; for

the law of repeal were a new law, and that were disabled by the former law; therefore it is void in itself, and the rule holds, *perpetua lex est, nullam legem humanam ac positivam perpetuam esse; et clausula quæ abrogationem excludit initio non valet.*

Neither is the difference of the civil law so reasonable as colourable. For they distinguish and say, that a derogatory clause is good to disable any latter act, except you revoke the same clause before you proceed to establish any latter disposition or declaration: for they say, *clausula derogatoria ad alias sequentes voluntates posita in testamento, (viz. si testator dicat quod, si contigerit eum facere aliud testamentum, non vult illud valere) operatur quod sequens dispositio ab illa clausula reguletur; et per consequens quod sequens dispositio ducatur sine voluntate, et sic quod non sit attendendum.* The sense is: that where a former will is made, and after a latter will; the reason why, without an express revocation of the former will, it is by implication revoked is, because of the repugnancy between the disposition of the former and the latter; but where there is such a derogatory clause, there can be gathered no such repugnancy; because it seemeth the testator had a purpose at the making of the first will to make some shew of a new will, which nevertheless his intention was should not take place. But this was answered before; for if that clause were allowed to be good until a revocation, then could no revocation at all be made: therefore it must needs be void by operation of law at first. Thus much of *clausula derogatoria.*

## REGULA XX.

*Actus inceptus cujus perfectio pendet ex voluntate partium revocari potest; si autem pendet ex voluntate tertiæ personæ, vel ex contingenti, revocari non potest.*

In acts that are not fully executed and consummate, the law makes this difference: that if the first parties have put it in the power of a third person, or of a contingency, to give a perfection to their acts, then they have put it out of their own reach and liberty, and therefore there is no reason they should revoke them; but if the consummation depend upon the same consent which was the inception, then the law accounteth it vain to restrain them from revoking it: for as they may frustrate it by omission and *non feasance* at a certain time or in a certain sort or circumstance, so the law permitteth them to dissolve it by an express consent before that time or without that circumstance.

Therefore if two exchange land by deed or without deed, and neither enter; they may make a revocation or dissolution of the same exchange by mutual consent, so it be by deed: but not by parole; forasmuch as the making of an exchange needeth no deed, because it is to be perfected by entry, which is a ceremony notorious in the nature of livery; but it cannot be dissolved but by deed, because it dischargeth that which is but title.

[F. 36 Eliz.] So if I contract with I. D. if he lay me into my cellar three tuns of wine before Michaelmas, that I will bring into his garner twenty quarters of wheat before Christmas; before either of these days the parties may by assent dissolve the contract: but

after the first day there is a perfection given to the contract by action on the one side, and they may make cross releases by deed or parole, but never dissolve the contract.

For there is a difference between dissolving the contract, and release or surrender of the thing contracted. As if lessee for twenty years make a lease for ten years, and after he[1] take a lease for five years, he is in only of his lease for five years: and yet this cannot inure by way of surrender, (for a petty lease derived out of a greater cannot be surrendered back again,) but it inureth only by dissolution of contract; for a lease of land is but a contract executory from time to time of the profits of the land to arise; as a man may sell his corn or his tithe to spring or to be perceived for divers future years.

But to return from our digression. On the other side, if I contract with you for cloth at such a price as I. S. shall name; there if I. S. refuse to name, the contract is void; but the parties cannot discharge it, because they have put it in the power of a third person to perfect.

So if I grant my reversion; though this be an imperfect act before atturnment, yet, because the atturnment is the act of a stranger, this is not simply revocable, but by a policy or circumstance in law; as by levying a fine, or making a bargain and sale, or the like.

So if I present a clerk to the bishop; now can I not revoke this presentation, because I have put it out of myself, that is, in the bishop, by admission to perfect my act begun. [Fitz. Tit. Qu. Imp. 185. 14 Ed. 4. f. 2. pl. 2. 38 Ed. 3. f. 35, 36.][2]

[1] *i. e.* I suppose, the sub-lessee. The MSS. vary considerably.

[2] The cases by no means establish the position in the text.

The same difference appeareth in nominations and elections: as if I enfeoff I. S. upon condition to enfeoff such a one as I. D. shall name within a year, and I. D. name I. B.: yet before the feoffment and within the year, I. D. may countermand his nomination and name again, because no interest passeth out of him: but if I enfeoff I. S. to the use of such a one as I. D. shall name within a year, then if I. D. name I. B. it is not revocable, because the use passeth presently by operation of law.

So in judicial acts the rule of the civil law holdeth, *sententia interlocutoria revocari potest, definitiva non potest;* that is, an order may be revoked, but a judgment cannot: and the reason is, because there is title of execution or of bar given presently unto the party upon judgment, and so it is out of the judge to revoke in courts ordered by the common law.

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## REGULA XXI.

*Clausula vel dispositio inutilis per præsumptionem remotam vel causam ex post facto non fulcitur.*

*Clausula vel dispositio inutilis* are said, when the act or the words do work or express no more than law by intendment would have supplied: and therefore the doubling or iterating of that, and no more, which the conceit of law doth in a sort prevent and preoccupate, is reputed nugation; and is not supported and made of substance either by foreign intendment of some purpose, in regard whereof it might be material, nor upon any cause or matter emerging afterwards,

which may induce an operation of those idle words or acts.

And therefore if a man devise land at this day to his son and heir, this is a void devise; because the disposition of law did cast the same upon the heir by descent: and yet if it be knight's service land, and the heir within age, if he take by the devise he shall have two parts of the profits to his own use, and the guardian shall have benefit but of the third. But if a man devise land to his two daughters, having no sons, then the devise is good; because he doth alter the disposition of law: for by the law they should take in coparcenary, but by the devise they shall take jointly; and this is not any foreign collateral purpose, but in point of taking of estate. Brook, Tit. Gard. pl. 93. Tit. Devise, pl. 41.

So if a man make a feoffment in fee to the use of his last will and testament, these words of special limitation are void, and the law reserveth the ancient use to the feoffor and his heirs: and yet if the words might stand, then should it be authority by his will to declare and appoint uses, and then, though it were knight's service land, he might dispose the whole: as if a man make a feoffment in fee to the use of the will and testament of a stranger; there the stranger may declare an use of the whole by his will, notwithstanding it be knight's service land. But the reason of the principal case is, because uses before the statute of 27 H. 8. were to have been disposed by will; and therefore before that statute an use limited in the form aforesaid was but a frivolous limitation, in regard that the old use which the law reserved was devisable; and the statute of 27 altereth not the law as to the creating and limiting of Dy. f. 12. 19 H. 8. f. 11. pl. 5. 5 Ed. 4. f. 8. pl. 20.

any use; and therefore, after that statute and before the statute of wills, when no land could have been devised, yet it was a void limitation as before, and so continueth at this day.

But if I make a feoffment in fee to the use of my last will and testament, thereby to declare an estate tail and no greater estate, and after my death, and after such estate declared shall expire, or in default of such declaration, then to the use of I. S. and his heirs, this is a good limitation; and I may by my will declare an use of the whole land to a stranger, though it be held in knight's service; and yet I have an estate in fee simple by virtue of the old use during life.

Dy. f. 237. pl. 31. So if I make a feoffment in fee to the use of my right heirs, this is a void limitation, and the use reserved by the law doth take place: and yet, if the limitation should be good, the heir should come in by way of purchase, who otherwise cometh in by descent: but this is but a circumstance which the law respecteth not, as was proved before. But if I make a feoffment in fee to the use of my right heirs and the right heirs of I. S. this is a good use; because I have altered the disposition of law. Neither is it void for a moiety, but both our right heirs when they

30 Ass. pl. 47. 30 Ed. 3. f. 27, 28. Fitz. Tit. Devise, pl. 9. Bro. Tit. Don. & Rem. pl. 21. come in being shall take by joint purchase; and he to whom it first falleth shall take the whole, subject nevertheless to his companion's title, so it have not descended from the first heir to the heir of the heir: for a man cannot be joint-tenant claiming by purchase, and the other by descent; because they be several titles.

So if a man having land on the part of his mother make a feoffment in fee to the use of himself and his

heirs; this use, though expressed, shall not go to him and the heirs on the part of his father as a new purchase, no more than it should have done if it had been a feoffment in fee nakedly without considera- Dyer, f. 184. tion; for the intendment is remote. But if baron and feme be, and they join in a fine of the feme's land, and express an use to the husband and wife and their heirs; this limitation shall give a joint estate by entierties to them both; because the intendment of law would have conveyed the use to the feme alone. And thus much touching foreign intendments.

For matter *ex post facto:* if a lease for life be made to two and the survivor of them, and they after make partition; now these words "and the survivor of them" should seem to carry purpose as a limitation, that either of them should be estated of his part for both their lives severally: but yet the law at the first 30 Ass. pl. 8. Fitz. Tit. construeth the words but words of dilating to Partit. pl. 16. describe a joint estate; and if one of them Dy. f. 46. pl. 7. die after partition, there shall be no occupant, but his part shall revert.

So if a man grant a rent charge out of ten acres, and grant further that the whole rent shall issue out of every acre, and distress accordingly, and afterwards the grantee purchase an acre: now this clause should seem to be material to uphold the rent; but yet nevertheless the law at the first accepteth of these words but as words of explanation, and, them notwithstanding, the whole rent is extinct.

So[1] if a gift in tail be made upon condition Plow. f. 33. that, if tenant in tail die without issue, it shall per Hinde. be lawful for the donor to enter; and the donee discon-

[1] Omitted in Camb. MS.

tinue and die without issue: now this condition should seem material to give him benefit of entry; but because it did at the first limit the estate according to the limitation of law, it worketh nothing upon this matter emergent afterward.

So if a gift in tail be made of lands held in knight's service, with an express reservation of the same service whereby the land is held over, and the gift is with warranty, and the land is evicted, and other land recovered in value against the donor held in socage: now the tenure which the law creates between the donor and donee shall be in socage, and not in knight's service; because the first reservation was according to owelty of service, which was no more than the law would have reserved. But if a gift in tail had been made of lands held in socage, with a reservation of knight's service tenure, and with warranty; then, because the intendment of law is altered, the new land shall be held by the same service the lost land was, without any regard at all to the tenure paramount. And thus much of matter *ex post facto*.

This rule faileth where that the law saith as much as the party, but upon foreign matter not pregnant and appearing upon the same act and conveyance. As if lessee for life be, and he lets for twenty years, if he live so long; this limitation "if he live so long" is no more than the law saith; but it doth not appear upon the same conveyance or act that this limitation is nugatory, but it is foreign matter in respect of the truth of the estate whence the lease is derived; and therefore, if lessee for life make a feoffment in fee, yet the estate of the lessee for years is not enlarged against the feoffee: otherwise it had been if such limi-

tation had not been, but that it had been left only to the law.

So if tenant after possibility make a lease for years, and the donor confirms to the lessee to hold without impeachment of waste during the life of tenant in tail; this is no more than the law saith: but the privilege of tenant after possibility is foreign matter as to the lease and confirmation; and therefore if tenant after possibility do surrender, yet the lessee shall hold dispunishable of waste: otherwise had it been if no such confirmation had been made.

Also heed must be given that it be indeed the same thing, which the law intendeth, and which the party expresseth; and not only like or resembling, and such as may stand both together: for if I let land for life rendering rent, and by my deed warrant the same land; this warranty in law and warranty in deed are not the same thing, but may both stand together.[1]

There remaineth yet a great question on this rule:

A principal reason whereupon this rule is built should seem to be, because such acts or clauses are thought to be but declaratory, and added upon ignorance of the law and *ex consuetudine clericorum* upon observing of a common form, and not upon purpose or meaning; and therefore whether by particular and precise words a man may not control the intendment of the law?

To this I answer, that no precise nor express words will control this intendment of law; but as the general words are void, because they say that the law saith, so the particular words are void, because they

[1] The Camb. MS. adds: "therefore if I release the rent, I shall warrant nevertheless upon the warranty in fact."

say contrary to that which the law saith, and so are thought to be against the law. And therefore if I demise my land being knight's service tenure to my heir, and express my intention to be, that the one part shall descend to him as the third appointed by statute, and the other he shall take by devise to his own use; yet this is void: for the law saith he is in by descent of the whole, and I say he shall be in by devise; which is against the law.

Lit. secs. 362. 364. But if I make a gift in tail, and say upon condition that if tenant in tail discontinue and after die without issue, it shall be lawful for me to enter; this is a good clause to make a condition, because it is but in one case, and doth not cross the law generally: for if the tenant in tail in that case be disseised, and a descent cast, and die without issue; I that am the donor shall not enter. But if the clause had been, provided that if tenant in tail discontinue, or suffer a descent, or do any other act whatsoever, that after his death without issue it shall be lawful for me to enter; now this is a void condition: for it importeth a repugnancy to law; as if I would overrule that, where the law saith I am put to my action, I nevertheless will reserve to myself an entry.

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## REGULA XXII.

*Non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit.*

Although choice and election be a badge of consent; yet if the first ground of the act be duresse, the

law will not construe that the duresse doth determine, if the party duressed do make any motion or offer.

And therefore if a party menace me, except I make unto him a bond of forty pounds; and I tell him that I will not do it, but I will make him a bond of twenty pounds; the law will not expound this bond to be voluntary, but will rather make construction that my mind and courage is not to enter into the greater bond for any menace, and yet that I enter by compulsion notwithstanding into the lesser.

But if I will draw any consideration to myself; as if I had said, I will enter into your bond of forty pounds if you will deliver me that piece of plate; now the duresse is discharged: and yet if it had moved from the duressor, who had said at the first, You shall take this piece of plate, and make me a bond of forty pounds; now the gift of the plate had been good, and yet the bond shall be avoided by duresse.

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## REGULA XXIII.

*Licita bene miscentur, formula nisi juris obstet.*

The law giveth that favour to lawful acts that, although they be executed by several authorities, yet the whole act is good.

As when tenant for life is, the remainder for life, the remainder in fee; and they join in livery by deed, or without; this is one good entire livery drawn from them all, and doth not inure by surrender of the particular estate, if it be without deed, or by confirma-

tion of those in the remainder, if it be by deed; but they are all parties to the livery.[1]

So if tenant for life, the remainder in fee, be; and they join in granting a rent charge, this is one solid rent out of both their estates, and no double rent, nor rent by confirmation.

So if tenant in tail be at this day, and he make a lease for three lives and his own; this is a good lease, and warranted by the statute of 32 H. VIII. and yet it is good in part by the authority which tenant in tail hath by the common law, that is for his own life, and in part by the authority which he hath by the statute, that is for the other three lives.

So if a man be seised of lands devisable by custom, and of other lands held in knight's service, and devise all his lands; this is a good devise of all the lands customary by the common law, and of two parts of the other lands by the statute.

So in the Star-chamber a sentence may be good, grounded in part upon the authority given the court by the statute of 3 H. VII. and in part upon that ancient authority which the court hath by the common law,[2] and so upon several commissions.

But if there be any form which the law appointeth to be observed which cannot agree with the diversity of authorities, then this rule faileth; as if three coparceners be, and one of them alien her purparty; the feoffee and one of the sisters cannot join in a writ *de part' facienda*, because it behoveth the feoffee to mention the statute in his writ.

Co. Litt. 175 b.

[1] A commentator in the first edition observes that the law is clearly contrary, and cites many authorities. It seems to me one of the clearest instances of Bacon's intentional "correction of the law."

[2] The two MSS. in the Br. Mus. introduce here, "and yet no Bishop or Lord Temporal present;" besides some other verbal differences.

## REGULA XXIV.

*Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis.*

THERE be three degrees of certainty; presence; name; and demonstration or reference: whereof the presence the law holdeth of greatest dignity; the name in the second degree; and the demonstration or reference in the lowest; and always error or falsity in the less worthy shall not control nor frustrate sufficient certainty and verity in the more worthy.

And therefore if I give a horse to I. D. being present, and say unto him, I. S. take this; this is a good gift, notwithstanding I call him by a wrong name: but so had it not been if I had delivered the horse to a stranger to the use of I. S. where I meant I. D.

So if I say unto I. S. Here I give you my ring with the ruby, and deliver it with my hand, and the ring bear a diamond and no ruby; this is a good gift notwithstanding I named it amiss: so had it not been if by word or writing, without the delivery of the ring itself, I had given the ring with the ruby; although I had none such, but only one with a diamond, which I meant, yet it would not have passed.

So if I by deed grant unto you by general words all the lands which the King hath passed unto me by letters patent dated 1° Maii, unto this present indenture annexed; and the patent annexed have date 1° Julii; yet if it be proved that that was the true patent annexed, the presence of the patent maketh the error of the date recited not material: but if no patent had been annexed, and there had been also no other cer-

tainty given but the reference of the patent the date whereof was misrecited; although I had no other patent ever of the King, yet nothing would have passed.

Like law is it, but more doubtful, where there is not a presence, but a kind of representation; which is less worthy than a presence, and yet more worthy than a name or reference.

As if I covenant with my ward, that I will tender unto him no other marriage than the gentlewoman whose picture I delivered him, and that picture hath about it *ætatis suæ anno* 16, and the gentlewoman is seventeen years old; yet nevertheless, if it can be proved that the picture was made for that gentlewoman, I may, notwithstanding this mistaking, tender her well enough.

So if I grant you for life a way over my land, according to a plot indented between us; and, after, I grant unto you and your heirs a way according to the first plot indented, whereof a double is annexed to these presents; and there be some special variance between the double and the original plot: yet this representation shall be certainty sufficient to lead unto the first plot; and you shall have the way in fee nevertheless, according to the first plot, and not according to the double.

So if I grant unto you by general words the land which the King hath granted me by his letters patent, *quarum tenor sequitur in hæc verba*, &c. and there be some mistaking in the recital and variance from the original patent, although it be in a point material; yet the representation of this whole patent shall be as the annexing of the true patent, and the grant shall not be void by this variance.

Now, for the second part of this rule, touching the name and the reference; for the explaining thereof it must be noted what things sound in name or denomination, and what things sound in demonstration or addition: as first, in lands the greatest certainty is, where the land hath a proper name and cognizance; as, "the manor of Dale," "Grandfield," &c.: the next is equal to that, when the land is set forth by bounds and abuttals, as "a close of pasture abutting on the east part upon Emsden Wood, on the south upon, &c." It is also a sufficient name to lay the general boundary, that is, some place of larger precinct, if there be no other land to pass in the same precinct; as "all my lands in Dale," "my tenement in St. Dunstan's parish," &c. A fourth sort of denomination is, to name lands by the attendancy they have to other lands more notorious; as "parcel of my manor of D." "belonging to such a college," "lying upon Thames' Bank, &c."

All these things or notes sound in name or denomination of lands; because they be signs local, and therefore of property to signify and name a place.

But these notes, that sound only in demonstration or addition, are such as are but transitory and accidental to the nature of a place:

As, *modo in tenura et occupatione* I. S. For the proprietary, tenure, or possession is but a thing transitory in respect of land; *Generatio venit, generatio migrat, terra autem manet in æternum.*

So likewise matter of conveyance, title, or instrument:

As, *quæ perquisivi de I. D.* or *quæ descendebant à I. N. patre meo*, or, *in prædicta indentura dimissionis*, or, *in prædictis literis patentibus specificat'.*

So likewise, *continent' per æstimationem* 20 *acras :* or if *per æstimationem* be left out, all is one, for it is understood; and this matter of measure, though it seem local, yet it is indeed but opinion and observation of men.

This distinction being made, the rule is to be examined by it.

Therefore if I grant my close called Dale, in the parish of Hurst, in the county of Southampton; and the parish likewise extendeth into the county of Berkshire, and the whole close of Dale lieth in the county of Berkshire; yet because the parcel is specially named, the falsity of the addition hurteth not; and yet this addition did sound in name; but, as was said, it was less worthy than a proper name.

So if I grant *tenementum meum*, or *omnia tenementa mea*, (for the universal and indefinite to this purpose are all one) *in parochia Sancti Butolphi extra Aldgate*, where the verity is *extra Bishopsgate*, *in tenura Guilielmi*, which is true; yet this grant is void, because that which sounds in denomination is false, which is the more worthy, and that which sounds in addition is true, which is the less; and though *in tenura Gui-* See 8 Co. 10. *lielmi*, which is true, had been first placed, yet it had been all one, the notes being of unequal dignity.

But if I grant *tenementum meum quod perquisivi de R. C. in Dale*, where the truth was T. C., and I have no other tenement in Dale but one; this grant is good, because that which soundeth in name, namely, *in Dale*, is true, and that which sounded in addition, *viz. quod perquisivi*, &c., is only false.

So if I grant *prata mea in Sale continentia* 10 *acras*,

and they contain indeed 20 acres, the whole twenty pass.

So if I grant all my lands, being parcels *manerii de D. in prædictis literis patentibus specificat'*, and there be no letters patent; yet the grant is good enough.

The like reason holds in demonstration of persons that hath been declared in demonstration of lands and places: the proper name of every one is in certainty worthiest; next are such appellations as are fixed to his person, or at least of continuance, as "son of such a man," "wife of such a husband," or additions of office, as "clerk of such a court," &c.; and the third are particular actions or accidents, which sound no way in appellation or name but only in circumstance, which are less worthy, although they may have a more particular reference to the intention of the grant.

And therefore if an obligation be made to I. S. *filio et hæredi G. S.* where indeed he is a bastard; yet the obligation is good.

So if I grant land *Episcopo nunc Londinensi qui me erudivit in pueritia;* this is a good grant, although he never instructed me.

But *è converso*, if I grant land to I. S. *filio et hæredi G. S.* and it be true that he is son and heir unto G. S. but his name is Thomas; this is a void grant.

Or if in the former grant it was the Bishop of Canterbury who taught me in my childhood, yet shall it be good, as was said, to the Bishop of London, and not to the Bishop of Canterbury.

The same rule holdeth in denomination of times; which are, such a day of the month, such a day of the week, such a Saint's day or eve, to-day, to-mor-

row: these are names of times: but the day that I was born, the day that I was married; these are but circumstances and additions of times.

And therefore if I bind myself to do some personal attendance upon you upon Innocents' day, being the day of your birth, and you were not born that day; yet shall I attend.

There rest yet two questions of difficulty upon this rule:

First, of such things whereof men take not so much note, as that they fall into this distinction of name and of addition: as, "my box of ivory lying in my study, sealed up with my seal of arms;" "my suit of arras with the story of the nativity and passion:" of such things there can be no name, but all is of description and circumstance; and of these I hold the law to be, that precise truth of all recited circumstances is not required, but in such things, *ex multitudine signorum colligitur identitas.*

Therefore though my box were not sealed, and although the arras had the story of the nativity, and not of the passion, if I had no other box, nor no other suit, the gifts are good; and there is certainty sufficient: for the law doth not expect a precise description of such things as have no certain denomination.

Secondly, Of such things as do admit the distinction of name and of addition, but the notes fall out to be of equal dignity, all of name, or all of addition: as, *prata mea juxta communem fossam in D.* whereof the one is true, the other false; or *tenementum meum in tenura Guilielmi quod perquisivi de R. C. in prædict' indent' specificat'*, whereof one is true, and two are false, or two are true, and one false: so *ad curiam*

*quam tenebat die Mercurii tertio die Martii*, whereof the one is true, the other false.

In these cases the former rule, *ex multitudine signorum*, &c. holdeth not; neither is the placing of the falsity or verity first or last material; but all must be true, or else the grant is void: always understood, that if you can reconcile all the words, and make no falsity, that is a case quite out of this rule, which hath place only where there is a direct contrariety or falsity not to be reconciled to this rule.

As if I grant all my land in D. *in tenura I. S.* which I purchased of I. N. specified in a demise to I. D. and I have lands in D. whereof in part of them all these circumstances are true, but I have other lands in D. wherein some of them fail; this grant will not pass all my land in D.: for here these are references, and no words of falsity or error, but of limitation and restraint.

## REGULA XXV.

*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.*

THERE be two sorts of ambiguities of words; the one is *ambiguitas patens* and the other is *ambiguitas latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument: *latens* is that which seemeth certain and without ambiguity for any thing that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity.

*Ambiguitas patens* is never holpen by averment: and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed.

Therefore if a man give land to *I. D. et I. S. et hæredibus*, and do not limit to whether of their heirs; it shall not be supplied by averment to whether of them the intention was the inheritance should be limited.

Cheyney's case, 5 Co 68. So if a man give land in tail, though it be by will, the remainder in tail, and add a *proviso* in this manner, "Provided that if he, or they, or any of them do any act, &c.," according to the usual clauses of perpetuities; it cannot be averred, upon the ambiguity of the reference of this clause, that the intent of the devisor was, that the restraint should go only to him in the remainder and the heirs of his body, and that the tenant in tail in possession was meant to be at large.

Of these infinite cases might be put: for it holdeth generally that all ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some case by election; but never by averment, but rather shall make the deed void for uncertainty.

But if it be *ambiguitas latens*, then otherwise it is. As if I grant my manor of S. to I. F. and his heirs, here appeareth no ambiguity at all upon the deed; but if the truth be that I have the manors both of South S. and North S. this ambiguity is matter in fact; and

therefore it shall be holpen by averment, whether of them it was that the parties intended should pass. So if I grant my tenement in the parish of St. Dunstan's, and I have two tenements there; this uncertainty shall be supplied by averment of intention.

But if I set forth my grant by quantity; then it shall be supplied by election, and not by averment.

As if I grant ten acres of wood in Sale, where I have a hundred acres; whether I say it in my deed or no that I grant out of my hundred acres, yet here there shall be an election in the grantee, which ten he will take. And the reason is plain: for the presumption of law is, where the thing is only nominated by quantity, that the parties had an indifferent intention which should be taken; and there being no cause to help the uncertainty by intention, it shall be holpen by election.

But in the former cases the difference holdeth, where it is expressed, and where not. For if I recite, Whereas I am seised of the manor of North S. and South S. I lease unto you *unum manerium de S.* there it is clearly an election: and so if I recite, Whereas I have two tenements in St. Dunstan's, I lease unto you *unum tenementum*, there it is an election. Contrary law it is in the cases before, where I take no knowledge of the uncertainty; for there it is never an election, but an averment of intention: except the intent were of an election, which may also be specially averred.

Another sort of *ambiguitas latens* is correlative unto this: for this ambiguity spoken of before is, when one name and appellation doth denominate divers things; and the second is, when the same thing is called by divers names.

As if I give lands to Christ-Church in Oxford, and the name of the corporation is *Ecclesia Christi in Universitate Oxford;* this shall be holpen by averment, because there appears no ambiguity in the words: for the variance is matter in fact.

But the averment shall not be of the intention, because it doth not stand with the words. For in the case of equivocation the general intent includes both the special, and therefore stands with the words: but so it is not in variance; and therefore the averment must be of matter that doth induce a certainty,[1] and not of intention: As to say, that the precinct of "Oxford," and of "the University of Oxford," is one and the same; and not to say, that the intention of the parties was, that the grant should be to Christ-Church in the University of Oxford.

[1] I have conjecturally substituted "certainty" for "quantity." One MS. has a blank.

# READING

ON THE

# STATUTE OF USES.

# PREFACE.

THIS was Bacon's Double Reading[1] in Gray's Inn, in the Lent vacation, A. D. 1600. Coke had read to crowded audiences in the Inner Temple on the same subject in 1592,[2] and Bacon had argued for the defendants in the great Chudleigh case in 1594; so that we can readily imagine motives for this choice of subject. We have, however, no indication of his having taken any care of his work after the delivery.[3]

It was first published very incorrectly and evidently from a bad MS., in 1642. Better MSS. have been used and more pains taken by subsequent editors. I have used the common editions and three MSS. in the Harleian collection, Nos. 1858, 6688, and 829, (whereof the second ends abruptly in the middle, and the latter only embraces the last part or "division,") taking indiscriminately what appeared to me the best reading from each. Any merely conjectural emendations of my own I have always noticed as such, as also those

[1] One of the Ancients that had formerly read reads in Lent vacation, and is called Double Reader. *Preface to* 3 *Rep.* From several entries in the books of Gray's Inn, to which I have had access by the kindness of the treasurer, Mr. Broderip, it seems there was some difficulty in getting the office well filled. In 36 Eliz. the Judges made an order giving them audience next after serjeants.

[2] Article *Coke* in *Penny Cyclopædia.*

[3] But see *infra*, p. 293. note 3.

various readings which make a serious difference in meaning, but not generally those which are mere matters of style, or which make a clear sense where the common reading was obviously corrupt.

Mr. Rowe, in his elaborately annotated edition of 1804, has divided the treatise into three discourses, corresponding to the portions to which I have affixed separate headings. He has not, however, taken any notice of the plan of the work as indicated by Bacon himself, nor at all adequately pointed out how much is missing of what that plan embraced.

The reading was to extend over six days,[1] and on each day there was to be provided an introductory discourse on matter without the statute, a division on the statute, and a few cases for exercise and argument.

The subjects of the six introductions are set forth, and it is very clear that the first part of our treatise exactly corresponds with the first day's matter. The only deficiency I can conjecture is in the recapitulation at the close, which stops short with the "nature and definition of an use," and omits "its inception and progress," which are fully discoursed upon in the body of the lecture.

But it seems equally clear that we have no fragment of any of the other five intended introductions. The remainder of our treatise is entirely on "the law itself;" and besides, the subject of the second day's introduction was to be "the second spring of this tree of uses since the statute," which naturally required the exposition of the statute itself to have gone before.

Bacon not having laid out his six days' divisions as

[1] In the books of Gray's Inn is copied an order of the Judges that each double reader should give at least nine readings.

he has his introductions, we can only infer or conjecture the proportion in length of what we have of them to what is missing. Although, guided by MS. authority and the indications of the text, I have separated the general view of the statute from the detailed exposition of the law which follows, yet I incline to think that we have but the first day's work altogether; though it must be admitted that to master the whole of the existing treatise in one day was a hard task for students even in that much listening generation. My reason is, that in page 323., in the opening of the statute, he promises to handle, "in the next day's discourse," the question whether uses shall be executed out of the possession of a disseisor, or other possessions out of privity; and in page 342., in the division on the actors to the conveyance, he refers the subject of the occupant, the disseisor, the lord by escheat, and the feoffee upon consideration without notice, (which seems to be the same question as before, only set out in more detail,) to a division still to come.

What is more material to observe is, that of the three heads on which he was to lecture, viz. the raising, the interruption, and the executing of uses, we have nothing at all of the last two; and that of the three subdivisions of the first head, viz. on the actors in the conveyance, the use itself, and the form of the conveyance, the first only is here handled.

Excepting therefore incidentally, or by way of inference from his mode of laying down the general principles of the doctrine of uses, we have here no record of Bacon's opinions (and still less of the arguments on which he would found them,) on the chief of those knotty questions which were occupying the

courts in his time, and which were much discussed but by no means settled in Chudleigh's case. I have thought it worth while, in some notes at the end of the treatise, to make a few observations on those passages which indicate the result one may suppose he had arrived at, as well as on the difficulty there is, as it appears to me, in reconciling them all. As regards minor points and details of exposition, I have in general contented myself with indicating by a side reference (usually furnished to my hand by one or other of my predecessors) the cases which Bacon had, or ought to have had, before him when he wrote; leaving the reader to inquire for himself, if he so incline, whether the text expounds the law soundly or not.

THE

# LEARNED READING OF MR. FRANCIS BACON,

ONE OF HER MAJESTY'S COUNSEL AT LAW,

# UPON THE STATUTE OF USES:

BEING HIS DOUBLE READING TO THE HONOURABLE SOCIETY OF GRAY'S INN. 42 ELIZ.

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## INTRODUCTORY DISCOURSE.

I HAVE chosen to read upon the Statute of Uses, made 27 H. VIII. ch. 10., a law whereupon the inheritances of this realm are tossed at this day, as upon a sea, in such sort that it is hard to say which bark will sink, and which will get to the haven: that is to say, what assurances will stand good, and what will not. Neither is this any lack or default in the pilots, the grave and learned judges; but the tides and currents of received errors and unwarranted and abusive experience have been so strong, as they were not able to keep a right course according to the law. So as this statute is in great part as a law made in the Parliament held 35 Reginæ: for in 37 Reginæ, by the notable judgment given upon solemn arguments of all the judges assembled in the Exchequer Chamber, in

the famous case between Dillon and Freine, concerning an assurance made by Chudleigh, this law began to be reduced to a true and sound exposition; and the false and perverted exposition which had continued for so many years (but, howsoever, never countenanced by any rule or authority of weight, but only entertained in a popular conceit and put in practice at adventure) grew to be controlled.[1] Since which time, as it cometh to pass always upon the first reforming of inveterate errors, many doubts and perplexed questions have risen, which are not yet resolved, nor the law thereupon settled: the consideration whereof moved me to take the occasion of performing this particular duty to the house, to see if I could spend my travel to a more general good of the commonwealth herein. Wherein, though I could not be ignorant either of the difficulty of the matter, which he that taketh in hand shall soon find, or much less of my own unableness, which I had continual sense and feeling of; yet, because I had more means of observation[2] than the younger sort, and more leisure than the greater sort, I did think it not impossible to work some profitable effect: the rather because where an inferior wit is bent and constant upon one subject, he shall many times, with patience and meditation, dissolve and undo many of those knots which a greater wit, distracted with many matters, would rather cut in two than unknit. At the least, if my invention or judgment be too barren or too weak, yet, by the benefit of other arts, I did hope to dispose or digest the authorities and opinions which

Chudleigh's case. 1 Rep. 121. Poph. 71. 1 And. 314.

[1] See Note A. at the end.

[2] So Harl. MS. 6688. The common reading is "absolution."

are in cases of uses in such order and method as they should take light one from another, though they took no light from me.

And like to the matter of my reading shall my manner be; for my meaning is to revive and recontinue the ancient form of reading, which you may see in Mr. Frowicke's upon the prerogative and all other readings of ancient time, being of less ostentation and more fruit than the manner lately accustomed. For the use then was, substantially to expound the statutes by grounds and diversities, (as you shall find the readings still to run upon cases of like law and contrary law; whereof the one includes the learning of a ground, the other the learning of a difference,) and not to stir conceits and subtle doubts, or to contrive a multitude of tedious and intricate cases, whereof all, saving one, are buried, and the greater part of that one case which is taken is commonly nothing to the matter in hand. But my labour shall be in the ancient course, to open the law upon doubts, and not to open doubts upon the law.

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The exposition of this statute consists upon matter without the statute, and matter within the statute.

There be three things concerning this statute, and all other statutes, which are helps and inducements to the right understanding of any statute, and yet are no part of the statute itself:

1. The consideration of the case at the common law.

2. The consideration of the mischief which the stat-

ute intendeth to redress; as also any other mischief, which an exposition of the statute this way or that way may breed.

3. Certain maxims of the common law, touching exposition of statutes.

Having therefore framed six divisions, according to the number of readings, upon the statute itself, I have likewise divided the matter without the statute into six introductions or discourses; so that for every day's reading I have made a triple provision:

1. A preface or introduction.
2. A division upon the law itself.
3. A few brief cases for exercise and argument.

The last of which I would have forborn, and, according to the ancient manner, you should have taken some of my points upon my divisions, one, two, or more, as you had thought good; save that I had this regard, that the younger sort of the bar were not so conversant in matters upon the statutes; and for their ease I have interlaced some matters at the common law, that are more familiar within the books.

1. The first matter I will discourse unto you is the nature and definition of an use, and its inception and progression before the statute.

2. The second discourse shall be of the second spring of this tree of uses since the statute, after[1] it was lopped and ordered by the statute.

3. The third discourse shall be of the estate of the assurances of the realm at this day upon uses, and what kind of them is convenient and reasonable and not fit to be shaken or touched, as far as the sense of law and a natural construction of the statute will give

[1] Omitted in the editions and MS. 1858.

leave; and what kind of them is inconvenient and meet to be suppressed.

4. The fourth discourse shall be of certain rules of expositions of laws applied to the present purpose.

5. The fifth discourse shall be of the best course to remedy the inconveniences now a foot by construction of the statute, without offering violence to the letter or sense.

6. The sixth and last discourse shall be of the best course to remedy the same inconveniences and to declare the law by act of parliament: which last I think good to reserve, and not to publish.

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Nature and definition of an use.

The nature of an use is best discerned by considering, first, what it is not; and then what it is: for it is the nature of all human science and knowledge to proceed most safely by negative and exclusion, to what is affirmative and inclusive.

First, therefore, an use is no right, title, or interest in law; and therefore Mr. Attorney,[1] who read upon this statute, said well, that there are but two rights: *Jus in re: Jus ad rem.* The one is an estate, which is *Jus in re:* the other a demand, which is *Jus ad rem.* But an use is neither: so that in 24 H. VIII. it is said that the saving of the statute of 1 R. III., which saveth any right or interest of intails, must be understood of intails of the possession, and not of the use, because an use is no right nor inter-

Br. Feoff. al uses, pl. 40.

[1] Coke, who read at the Inner Temple in 1592. He repeats the phrase in his Report of Chudleigh's Case, 1 Rep. 121.; and one may well suppose we have there some fragments of his reading worked up into the argument.

Sec. 462, &c. est; so again, you see Littleton's conceit, that an use should amount to a tenancy at will whereupon a release might well inure because of privity, is controlled by 5 H. VII. 5. and divers other books, which say that *cestui que use* is punishable in trespass towards the feoffees. Only 5 H. V. 3. seemeth to be at some discord with other books, where it is admitted for law, that if there be *cestui que use* of an advowson, and he be outlawed in a personal action, the king should have the presentment; which case Master Ewens, in the argument of Chudleigh's case, did seek to reconcile thus: where *cestui que use*, being outlawed, had presented in his own name, there the king should remove his incumbent. But no such thing can be collected upon the book, and, therefore, I do rather conceive the error grew upon this; that, because it was generally thought that an use was but a pernancy of profits, and then again, because the law is that upon outlawries upon personal actions the king shall have the pernancy of profits, they took that to be one and the selfsame thing which *cestui que use* had, and which the king was entitled unto: which was not so; for the king had remedy in law for his pernancy of the profits, but *cestui que use* had none.

15 H. 7. 2. & 13.

Br. Presentation al Eglise pl. 16., and Forfeiture, pl. 14.

The books go farther, and say that an use is nothing. As in 2 H. VII. 4. debt was brought and the plaintiff counted upon a demise for years rendering rent, &c.; the defendant pleaded in bar, that the plaintiff *nihil habuit tempore dimissionis;* the plaintiff made a special replication, and showed that he had an use, and issue joined upon that: whereby it appeareth that if he had taken issue upon the defendant's plea, it should have

been found against him. So again in 4 Re- Dyer, 215.
ginæ, in the case of the Lord Sandys, the truth of the case was, a fine was levied by *cestui que use* before the statute, and this coming in question since the statute, upon an averment by the plaintiff *quod partes finis nihil habuerunt*, it is said that the defendant may show the special matter of the use, and it shall be no departure from the first pleading of the fine; and it is said farther, that the form of averment given in 4 H. VII. *quod partes finis nihil habuerunt, nec in possessione, nec in usu*, was ousted by this statute of 27 H. VIII. and was no more now to be accepted; but yet it appears that if issue had been taken upon the general averment, without the special matter showed, it should have been found for him that took the averment, because an use is nothing.

But these books are not to be taken generally or grossly; for we see in the same books, that when an use is specially alleged, the law taketh knowledge of it. But the sense of it is, that an use is nothing for which any remedy is given by the course of the common law; so as the law knoweth it, but protects it not: and, therefore, when the question cometh, whether it hath any being in nature or in conscience, the law accepteth of it; and therefore Littleton's case is good law, that he that hath but forty shillings free- Sec. 464.
hold in use, shall be sworn of an inquest, for that is ruled *secundum dominium naturale*, and not *secundum dominium legitimum; nam natura dominus est, qui fructum ex re percipit.* And so, no doubt, upon subsidies and taxes *cestui que use* should have been valued as an owner: so, likewise, if *cestui que use* had released his use unto the feoffee for six pounds, or contracted with

a stranger for the like sum, there was no doubt but it was a good consideration whereon to ground an action upon the case for the money: for the release of a suit in the Chancery is a good *quid pro quo*. Therefore, to conclude, though an use be nothing in law to yield remedy by course of law, yet it is somewhat in reputation of law and in conscience: for that may be somewhat in conscience which is nothing in law, like as that may be something in law which is nothing in conscience; as, if the feoffees had made a feoffment over in fee *bona fide* upon good consideration, and upon a *subpœna* brought against them they pleaded this matter in Chancery, this had been nothing in conscience, not as to discharge them of damages.

A second negative fit to be understood is, that an use is no covin; nor it is no confidence[1] as the word is now used.

For it is to be noted that where a man doth remove the estate and possession of lands or goods out of himself unto another upon trust, it is either a special trust, or a general trust.

The special trust, again, is either lawful, or unlawful.

The special trust unlawful appears in the cases provided for by ancient statutes of pernors of the profits; as where it is to defraud creditors, or to get men to maintain suits, or to defeat the tenancy to the *præcipe*, or the statute of mortmain, or the lords of their wardships, or the like. And these are termed frauds, covins, or collusions.

[1] So Harl. MS. 6688. The common reading is "collusion." Bacon is describing and distinguishing three things; the "covin," the "confidence," which are special trusts, and the "general trust," or use.

The special trust lawful is as when I infeoff some of my friends because I am to go beyond the seas, or because I would free the land from some statute or bond which I am to enter into, or upon intent to be reinfeoffed, or upon intent to be vouched and so to suffer a common recovery, or upon intent that the feoffees shall infeoff over a stranger, and infinite the like intents and purposes which fall out in men's dealings and occasions. And this we call confidence, and the books do call them intents.

But where the trust is not special, nor transitory, but general and permanent, there it is an use. And therefore these three are to be distinguished, and not confounded: the covin, the confidence, and the use.

So as now we are come by negatives to the affirmative, what an use is; agreeable to the definition in Delamer's case, where it is said: an use is a trust reposed by any person in the terretenant, that he may suffer him to take the profits, and that he will perform his intent. But it is a shorter speech to say, that *usus est dominium fiduciarium:* Use is an ownership in trust. Plowd. 352.

So that *usus et status, sive possessio, potius differunt secundum rationem fori, quam secundum naturam rei,* for what one is in course of law, the other is in course of conscience. And for a trust, which is *genus*[1] to the use, it is exceedingly well defined by Azo, a civilian of great understanding: *Fides est obligatio conscientiæ unius ad intentionem alterius.* And they have a good division likewise of rights: *Jus precarium: Jus fiduciarium: Jus legitimum:* a right in courtesy, for the which there is no remedy at all: a right in trust, for

[1] So Harl. MS. 6688. The common reading is "the way."

which there is a remedy, but only in conscience: a right in law.

So much of the nature and definition of an use.

The parts and properties of a use.

It followeth to consider the parts and properties of an use: wherein it appeareth by the consent of all books, and it was distinctly delivered by Justice Walmsley in 36 of Elizabeth: that the[1] trust consisteth upon three parts:

The first, that the feoffee will suffer the feoffor to take the profits: the second, that the feoffee upon the request of the feoffor, or notice of his will, will execute the estate to the feoffor, or his heirs, or any other by his direction: the third, that if the feoffee be disseised, and so the feoffor disturbed, the feoffee will reenter, or bring an action to recontinue the possession. So that these three, pernancy of profits, execution of estates, and defence of the land, are the three points of the trust.

For the properties of an use, they are exceeding well set forth by Fenner, Justice, in the same case; and they be three:

Uses, saith he, are created by confidence; preserved by privity (which is nothing else but a continuance of the confidence without interruption); and ordered and guided by conscience, either by the private conscience of the feoffee, or the general conscience of the realm, which is Chancery.[2]

The two former of which, because they be matters more thoroughly beaten and we shall have occasion

[1] So Harl. MS. 6688. instead of "a:" *i. e.* the trust which the feoffee is bound to perform.

[2] These passages from the judgments of Walmsley and Fenner do not appear elsewhere.

hereafter to handle them, we will not now dilate upon: but the third we will speak somewhat of; both because it is a key to open many of the true reasons and learnings of uses, and because it tendeth to decide our great and principal doubts at this day.[1]

Coke, Solicitor, entering into his argument of Chudleigh's case, said sharply and fitly:[2] "I will put never a case but it shall be of an use, for an use in law hath no fellow;" meaning, that the learning of uses is not to be matched with other learnings. And Anderson, Chief Justice, in the argument of the same case, did truly and profoundly control the vulgar opinion, collected upon 5 E. IV. 7. that there might be *possessio fratris* of an use; for he said that it was no more but that the chancellor would consult with the rules of law, where the intention of the parties did not specially appear. And therefore the private conceit, which Glanvile, Justice, cited in 42 Reginæ, in the case of Corbet[3] in the Common Pleas, of one of Lincoln's Inn, (whom he named not, but seemed well to allow of the opinion,) is not sound; which was, that an use was but an imitation and did ensue the nature of a possession.

Br. Descent, 36.

1 Rep. 88.

This very conceit was set on foot in 27 H. VIII. in the Lord Dacre's case, in which time they be-

27 H. 8. 9, 10.

[1] See Note B. at the end.

[2] I suppose the passage is represented in Coke's own report at the beginning of p. 123. by the parenthesis, "for the treatise shall be only of uses."

[3] In Coke's report, 1 Rep. 88., the opinion is given as Glanville's, without allusion to the Lincoln's Inn man. Coke represents the judgment to have been given in Easter Term, which was after this Reading; and, if so, we must suppose this passage to have been subsequently inserted. But the Pleadings show a judgment in Hilary Term and afterwards a writ of error: so that it seems possible Coke's Report may be, wholly or in part, of the judgment delivered just before Bacon's Reading.

gan to heave at uses. For there, after the realm had many ages together put in ure the passing of uses by will, they began to argue that an use was not devisable, but that it did ensue the nature of the land. And the same year, after, this statute was made; so that this opinion seemeth ever to be a prelude and forerunner to an act of Parliament touching uses: and if it be so meant now, I like it well; but in the meantime the opinion itself is to be rejected.

And because, in the same case of Corbet, three reverend judges of the court of Common Pleas did deliver and publish their opinion (though not directly upon the point adjudged, yet *obiter* as one of the reasons of their judgment), that an use of inheritance could not be limited to cease; and again, that the limitation of a new use could not be to a stranger — ruling uses merely according to the ground of possession — it is worth the labour to examine that learning.

Br. Feoff. al uses, 21. By 3 H. VII. 13. you may collect, that if the feoffees had been disseised by the common law, and an ancestor collateral of *cestui que use* had released unto the disseisor, and his warranty had attached upon *cestui que use;* yet the chancellor, upon this matter showed, would have no respect unto it, to compel the feoffees to execute the estate unto the disseisor: for there, the case being that *cestui que use* in tail made an assurance by fine and recovery and by warranty which descended upon his issue, two of the judges hold that the use is not extinct; and Bryan and Hussey, that held the contrary, said that the law is altered by the new statute; whereby they admit that by the common law a warranty will not bind and extinct a right of an use, as it will do a right of possession:

and the reason is, because the law of collateral warranty is a hard law, and not to be considered in a court of conscience. In 5 E. IV. 7. it is said, "if *cestui que use* be attainted, *quere* who shall have the land; for the lord shall not have it:" so as there the use doth not imitate the possession. And the reason is not because the lord hath a tenant in by title, for that is nothing to the *subpœna*, but because the feoffor's intent was never to advance the lord, but only his own blood; and therefore the *quere* of the book ariseth, what the trust and confidence of the feoffee did tie him to do, as, whether he should not sell the land to the use of the feoffor's will, or *in pios usus?* So favourably they took the intent in those days, as you may find in 37 H. VI., that if a man had appointed his use to one for life, the remainder in fee to another, and *cestui que use* for life had refused; because the intent appeared not to advance the heir at all, nor him in remainder presently, therefore the feoffee should make the estate for life of him that refused some ways to the behoof of the feoffor.

Br. Feoff. al uses, 34.

Fitz. Subp. 1. Br. Conscience, 5.

But to proceed in some better order towards the disproof of this opinion of imitation, there be four points wherein we will examine the nature of uses: the raising of them; the preserving of them; the transferring of them; the extinguishing of them. And in all these four you shall see apparently that uses stand upon their own reasons, utterly differing from cases of possession.

1. I would have one case showed by men learned in the law, where there is a deed, and yet there needs a consideration. As for parol, the law adjudgeth it too light to give action without consideration; but a deed ever in law imports a consideration, because of the de-

liberation and ceremony in the confection of it: and therefore in 8 Reginæ it is solemnly argued, that a deed should raise an use without any other consideration. In the Queen's case a false consideration, if it be of record, will hurt the patent, but want of consideration doth never hurt it. And yet they say that an use is but a nimble and light thing; and now, contrariwise, it seemeth to be weightier than any thing else: for you cannot weigh it up to raise it, neither by deed nor deed inrolled, without the weight of a consideration. But you shall never find a reason of this to the world's end in the law; but it is a reason of chancery, and it is this: that no court of conscience will inforce *donum gratuitum*, though the intent appear never so clearly, where it is not executed, or sufficiently passed by law; but if money had been paid, and so a person damnified, or that it was for the establishment of his house, then it is a good matter in the chancery. So again I would see in all the law a case, where a man shall take by conveyance, be it by deed, livery, or word, that is not party to the grant: I do not say that the delivery must be to him that takes by the deed, for a deed may be delivered to one man to the use of another: neither do I say that he must be party to the livery or deed, for he in the remainder may take though he be party to neither: but he must be party to the words of the grant. Here again the case of the use goeth single: and the reason is, because a conveyance in use is nothing but a publication of the trust; and therefore, so as the party[1] trusted be declared, it is not material to whom the publication be.

Sherrington v. Strotton, Plowd. 298. 309.

[1] I understand "the party trusted," as a translation of *cestui que in trust*, as we have elsewhere "estated," for "in of an estate." Harl. MS. 6688.

So much for the raising of uses. Now as to the preserving of them.

2. There is no case in the common law wherein notice simply and nakedly is material to make a covin, or *particeps criminis*. And therefore if the heir which is in by descent infeoff one which had notice of the disseisin, if he were not a *disseisor de facto*, it is nothing: so in 33 H. VI. 14. if a feoffment be made upon collusion, and feoffee makes a feoffment over upon good consideration; the collusion is discharged, and it is not material whether the second feoffee had notice or no. So, as it is put in 14 H. VIII. 8., if a sale be made in a market overt upon good consideration, although it be to one that hath notice that they are stolen goods, yet the property of a stranger is bound; though in the book before remembered, 35 H. VI. there be some opinion to the contrary, which is clearly no law. So in 31 E. III. if assets descend to the heir, and he alien it upon good consideration, although it be to one that had notice of the debt or of the warranty, it is good enough. So 25 Ass. pl. 1., if a man enter of purpose into my lands, to the end that a stranger which hath right should bring his *præcipe* and evict the land, I may enter notwithstanding any such recovery; but if he enter having notice that the stranger hath right, and the stranger likewise having notice of his entry, yet if it were not upon confederacy or collusion between them, it is nothing. And the reason of these cases is, because the common law looketh no farther than to see whether the act were merely *actus fictus in*

Br. Collusion and covin, 4.

altogether omits the reason given in the lines above, and has here "the party's trust be declared and accepted:" which I think must be a conjectural and erroneous correction.

*fraudem legis;* and therefore wheresoever it findeth consideration given, it dischargeth the covin.[1] But come now to the case of the use, and there it is otherwise: as it is in 14 H. VIII. 4. and 28 H. VIII. and divers other books; which prove that if the feoffee sell the land for good consideration to one that hath notice, the purchaser shall stand seised to the ancient use. And the reason is, because the chancery looketh farther than the common law, namely, to the corrupt conscience of him that will deal with the land knowing it in equity to be another's; and therefore, if there were *radix amaritudinis*, the consideration purgeth it not, but it is at the peril of him that giveth it. So that consideration, or no consideration, is an issue at the common law; but notice, or no notice, is an issue in the chancery. And so much for the preserving of uses.

Br. Feoffm. al uses, 10. Dyer, 7 *b.* to 13 *a.*

3. For the transferring of uses. There is no case in law where an action may be transferred; but the *subpœna* in case of use was always assignable. Nay, farther, you find twice, 27 H. VIII. fol. 20. pla. 9. and fol. 29. pla. 21. that a right of use may be transferred. For in the former case Montague maketh an objection, and saith that a right of use cannot be given by fine, but to him that hath the possession; Fitzherbert answereth, "Yes, well enough;" *quere* the reason, saith the book. And in the latter case, where *cestui que use* was infeoffed by the disseisor of the feoffee and made a feoffment over, Englefield doubted whether the second feoffee should have the use: Fitzherbert said, "I marvel you will make a doubt of it, for there is no doubt but the use passeth by the feoff-

[1] As Mr. Rowe has pointed out, the cases do not fully bear Bacon out.

ment to the stranger, and therefore this question needed not to have been made." So the great difficulty in 10 Reginæ, Delamer's case: where the case Plowd. 346. was in effect, there being tenant in tail of an use, the remainder in fee, tenant in tail made a feoffment in fee by the statute of 1 R. III. and that feoffee infeoffed him in the remainder of the use, who made a feoffment over; and there, question being made, whether the second feoffee should have the use in remainder, it is said that the second feoffee must needs have the best right in conscience; because the first feoffee[1] claimeth nothing but in trust, and the *cestui que use* cannot claim it against his sale: but the reason is apparent (as was touched before) that an use in *esse* was but a thing in action, or in suit to be brought in court of conscience, and whether the *subpœna* was to be brought against the feoffee in possession to execute the estate, or against the feoffee out of possession to recontinue the estate, always the *subpœna* might be transferred; for still the action at the common law was not stirred, but remained in the feoffee; and so no mischief of maintenance or transferring rights.

And if an use, being but a right, may be assigned and passed over to a stranger, *a multo fortiori* it may be limited to a stranger upon the privity of the first conveyance, as shall be handled in another place. And as to what Glanvile, Justice, said, that he could never find, neither by book nor evidence of any antiquity, a contingent use limited over to a stranger; I answer, first, it is no marvel that you find no case before E. IV. his time, of contingent uses, where there be not six of uses at all; and the reason, no doubt, was,

[1] *i. e.* the original feoffee to uses.

because men did choose well whom they trusted, and trust was well observed. And at this day in Ireland, where uses be in practice, cases of uses come seldom in question; except it be sometimes upon the alienations of tenants in tail by fine, that the feoffees will not be brought to execute estates to the disinheritance of the ancient blood. But for experience of contingent uses, there was nothing more usual in *obits* than to will the use of the land to certain persons and their heirs so long as they shall pay the chantry priests their wages, and in default of payment to limit the use over to other persons and their heirs, and so in course of forfeiture, through many degrees: and such conveyances are as ancient as R. II. his time.

4. Now for determining and extinguishing of uses, I put the case of collateral warranty before. Add to that, the notable case 14 H. VIII. 4. Half-penny's case, where this very point was in the principal case. For a rent out of land and the land itself, in course of possession, cannot stand together, but the rent shall be extinct; but there the case is, that the use of the land and the use of the rent may stand well enough together: for a rent charge was granted by the feoffee to one that had notice of the use; and ruled, that the rent was to the ancient use, and both uses were *in esse simul et semel;* and though Brudenell, Chief Justice, urged the ground of possession to be otherwise, yet he was overruled by other three justices; and Brooke said unto him, he thought he argued much for his pleasure.

Br. Feoffm. al uses, pl. 10.

And[1] to conclude, we see that things may be avoided

[1] Something seems wrong here, though all the editions and MSS. substantially agree. Either some intermediate cases are omitted, or, as I

and determined by ceremonies and acts like unto those by which they are created and raised: that which passeth by livery ought to be avoided by entry; that which passeth by grant, by claim; that which riseth by way of charge, determineth by way of discharge; and so an use, which is raised but by a declaration or limitation may cease by words of declaration or limitation. As the civilian saith, *nihil magis consentaneum est, quam ut iisdem modis res dissolvantur quibus constituuntur.*

Inception and progression of uses before the statute.

For the inception and progression of uses, I have, for a precedent of them, searched other laws; because states and commonwealths have common accidents. And I find in the civil law, that that which cometh nearest in name to the use is nothing like in matter, which is *usus fructus;* for *usus fructus* and *dominium* is with them, as with us particular tenancy and inheritance. But that which resembleth the use most is *fidei commissio;* and therefore you shall find, in Institut. lib. 2., that they had a form in testaments to give inheritance to one to the use of another, *Hæredem constituo Caium: rogo autem te, Cæie, ut hæreditatem restituas Seio.* And the text of the civilians saith that for a great time, if the heir did not as he was required, *cestui que use* had no remedy at all, until that about the time of Augustus Cæsar there grew in custom a flattering form of trust: for they penned it thus; *Rogo te per salutem Augusti*, or *per fortunam Augusti*, &c.: whereupon Augustus taking the breach of trust to sound in derogation of himself, made a rescript to the *prætor* to give

Tit. 23.

rather suspect, this paragraph belongs to some other part of the reading, and has slipt in here by mistake. The copy Mr. B. Montagu prints from has a reference to Digge's case, 1 Rep. 173.

remedy in such cases. Whereupon, within the space of a hundred years these trusts did spring and spread so fast, as they were forced to have a particular chancellor only for uses, who was called *prætor fidei commissarius;* and not long after, the inconvenience of them being found, they resorted to a remedy much like unto this statute; for, by two decrees of senate, called *senatus consultum Trebellianum et Pegasianum*, they made *cestui que use* to be heir in substance.

I have sought likewise whether there be any thing which maketh with them in our law; and I find that Periam, Chief Baron, in the argument of Chudleigh's case, compareth them to copyholders. And aptly for many respects: First, because as an use seemeth to be an hereditament in the court of chancery, so the copyhold seemeth to be an hereditament in the lord's court: Secondly, this conceit of imitation hath been troublesome in copyholds, as well as in uses; for it hath been of late days questioned, whether there should be dower, tenancy by the courtesy, intails, discontinuances, and recoveries of copyholds, in the nature of inheritances at the common law; and still the judgments have weighed, that you must have particular customs in copyholds, as well as particular reasons of conscience in use, and the imitation rejected: And thirdly, because they both grew to strength and credit by degrees; for the copyhold at first had no remedy at all against the lord, but was as a mere tenancy at will; afterwards it grew to have remedy in chancery, and afterwards against the lords by trespass at the common law; and now lastly the law is taken by some, that they have remedy by *ejectione firmæ*, without a special custom of leasing. So no doubt in

uses, at the first the chancery made question to give remedy, until uses grew more general, and the chancery more eminent; and then they grew to have remedy in conscience; but they could never maintain any manner of remedy at the common law, neither against the feoffee, nor against strangers; but the remedy against the feoffee was left to the *subpœna*, and the remedy against strangers to the feoffee.

Now for the causes whereupon uses were put in practice. Mr. Coke, in his Reading, doth say well, that they were produced sometimes for fear, and many times for fraud; but I hold that neither of these causes were so much the reasons of uses as another reason in the beginning, which was, that the lands by the common law of England were not testamentary or devisable; and, of late years, since the statute, the ease of the conveyance for sparing of repurchases and execution of estates; and now, last of all, an excess of will in men's minds, affecting to have assurances of their estates and possessions to be revocable in their own times, and too irrevocable after their own times.

Now for the commencement and proceeding of them, I have considered what it hath been in course of common law, and what it hath been in course of statute.

For the common law, the conceit of Shel- Bro. Feoffm. al use, pt. 40.
ley, in 24 H. VIII., and of Pollard, in 27 H. VIII., seemeth to me to be without ground; which was, that the use did succeed the tenure: for after that the statute of *Quia emptores terrarum*, which was made 18 E. I., had taken away the tenure between the feoffor and the feoffee, and left it to the lord paramount, they said that the feoffment, being then merely with-

out consideration, should therefore intend an use to the feoffor. Which cannot be; for, by that reason, if the feoffment before the statute had been made *tenendum de capitalibus dominis*, as it might be, there should have been an use unto the feoffor before that statute. And again, if a grant had been of such things as consist not in tenure, as advowsons, rents, villains, and the like, there should have been an use of them: wherein the law was quite contrary; for after the time that uses grew common, yet it was, nevertheless, a great doubt whether things that did lie in grant did not carry a consideration in themselves because of the deed. And therefore I do judge that the intendment of an use to the feoffor where the feoffment was without consideration grew long after, when uses waxed general; and for this reason: because when a feoffment was made, and that it rested doubtful whether it were in use or in purchase; because purchases were things notorious and trusts were things secret, the chancellor thought it more convenient to put the purchaser to prove his consideration than the feoffor and his heirs to prove the trust; and so made the intendment towards the use, and put the proof upon the purchaser.

And therefore, as uses were at the common law in reason, (for whatsoever is not by statute, nor against law, may be said to be at the common law,) and both the general trust and the special were things not prohibited by law, though they were not remedied by law: so the experience and practice of uses were not ancient. And my reasons why I think so are these four:

First, I cannot find in any evidence before King R.

II. his time the clause *ad opus et usum*.[1] And the very Latin of it savoureth of that time: for in ancient time, about E. I. and before, when lawyers were part civilians, the Latin phrase was much purer; as you may see partly by Bracton's writing, and by ancient patents and deeds, and chiefly by the register of writs, which is good Latin: whereas this phrase *ad opus et usum*, as to the words *ad opus*, is a barbarous phrase, and like enough to be the penning of some chaplain that was not much past his grammar, where he found *opus* and *usus* coupled together, that they did govern an ablative case; as they do indeed since this statute, for they take away the land and put them into a conveyance.

Secondly, I find in no private act of attainder, in the clause of forfeiture of lands, the words, "which he hath in possession or in use," until about Ed. IV.'s reign.

Thirdly, I find the word "use" in no statute until 7 R. II. cap. 11. of provisors, and in 15 R. II. of mortmain.

Fourthly, I collect out of Choke's speech in 8 E. IV. 5. (where he saith that, by the advice of all the judges, it was thought that the *subpœna* did not lie against the heir of the feoffee which was in by law, but *cestui que use* was driven to bill in parliament,) that uses even in that time were but in their infancy. For no doubt at the first the chancery made difficulty to give any remedy at all, and did leave it to the particular conscience of the feoffee: but after the chancery grew absolute, (as may appear

Fits. Abr. Subpœn. 8.

[1] Mr. Rowe cites Dyer, 160 *a.* and 295 *a.* as authority for a case in 24 Ed. III. where the phrase "a son œps demesne" occurs.

by the statute of 15 H. VI. c. 4. that complainants in chancery should enter into bond to prove their suggestions, which showeth that the chancery at that time began to embrace too far, and was used for vexation,) yet, nevertheless, it made scruple to give remedy against the heir, being in by act in law, though he were privy. So that it cannot be that uses had been of any great continuance when they made that question. As for the *causâ matrimonii prælocuti*,[1] it hath no affinity with uses; for wheresoever there was remedy at the common law by action, it cannot be intended to be of the nature of an use. And for the book commonly vouched of 8 Ass. where Herle calleth the possession of a conuzee upon a fine levied by consent "an entry in *auter droit*," and 44 E. III. where there is mention of feoffors that sued by petition to the King, they be but implications of no moment. So as it appeareth that the first practice of uses was about R. II.'s time, and the great multiplying and overspreading of them was partly during the wars in France, which drew most of the nobility to be absent from their possessions, and partly during the time of the trouble and civil wars between the two houses about the title of the crown.

Bro. Feoff. al use, 20. and 9.

Now to consider the progression of uses in course of statutes, I do note three special points:

First, that an use had never any force at all at the common law, but by statute law.

Secondly, that there was never any statute made directly for the benefit of *cestui que use*, as that the descent of an use should toll an entry, or that a release should be good to the pernor of the profits, or the like;

[1] Compared with an use in Lord Dacre's case, cited *supra*.

but always for the benefit of strangers and other persons against *cestui que use* and his feoffees: for though by the statute of R. III. he might alter his feoffee, yet that was not the scope of the statute, but to make good his assurances to other persons; and the other came in *ex obliquo*.

[1] Thirdly, that the special intent unlawful and covinous was the original of uses, though after it induced to the lawful intents general and special.

For 50 E. III. is the first statute I find wherein mention is made of the taking of profits by one, where the estate in law is in another. For as for the opinion in 27 H. VIII. 8. that in case of the statute of Marlebridge the feoffer took the profits, it is but a conceit: for the law is at this day, that if a man infeoff his eldest son, within age and without consideration, although the profits be taken to the use of the son, yet it is a feoffment within the statute. And for the statute *De Religiosis* 7 E. I. though it prohibits generally that religious persons shall not purchase *arte vel ingenio*, yet it maketh no mention of an use; but it saith "*colore donationis, termini, vel alicujus tituli*," reciting these three forms of conveyances, the gift, the long lease, and the feigned recovery; which gift cannot be understood of a gift to a stranger to their use, for that came to be holpen by 15 R. II. long after. Bro. Feoff. al use, 4.

But to proceed: in 50 E. III. c. 6. a statute was made for the relief of creditors against such as made covinous gifts of their lands and goods and conveyed their bodies into sanctuaries, there living high upon other men's goods; and therefore that statute made their lands liable to their creditors' executions in that

[1] See Note C. at the end.

particular case, if they took the profits. In 1 R. II. c. 9. a statute was made for relief of those as had right of action against such as had removed the tenancy of the *præcipe* from them, sometimes by infeoffing great persons for maintenance, and sometimes by secret feoffments to others whereof the demandants could have no notice; and therefore the statute maketh the recovery good in all actions against the first feoffors, so as they took the profits, and so as the demandants bring their action within a year of their expulsion. In 2 R. II. sess. 2. cap. 3. an imperfection in the statute of 50 E. III. was holpen; for whereas the statute took no place but where the defendant appeared, and so was frustrated, this statute giveth, upon proclamation made at the gate of the place privileged, that the land should be liable without appearance. In 7 R. II. cap. 12. a statute was made for the restraint of aliens to take any benefices or dignities ecclesiastical, or farms or administration of them, without the king's special license, upon pain of the statute of provisors: which, being remedied by a former statute where the alien took it to his own use, is by that statute remedied where the alien took it to the use of another, as it is printed in the book; though I guess[1] that, if the record were searched, it should be, "if any other purchased to the use of an alien," and that the words, "or to the use of another," should be, "or any other to his use." In 15 R. II. cap. 5. a statute was made for the relief of lords against mortmain, where feoffments were made to the use of corporations; and an ordinance made that, for feoffments past, the feoffees should, before a day, either purchase license to amortise them, or alien them to

[1] This guess is not confirmed by the Record Commission.

some other use, and, for feoffments to come, they should be within the statute of mortmain. In 4 H. IV. cap. 7. the statute of 1 R. II. is enlarged in the limitation of time; for whereas that statute did limit the action to be brought within the year of the feoffment, this statute, in the case of disseisin, extends the time to the life of the disseisor, and in all other actions leaves it to the year from the time of the action grown. In 11 H. VI. cap. 3. that statute of 4 H. IV. is declared; because the conceit was, upon that statute, that in case of disseisin the limitation of the life of the disseisor went only to the assize of *novel disseisin*, and to no other action: and therefore this statute declareth the former law to extend to all other actions grounded upon *novel disseisin*. In 11 H. VI. cap. 5. a statute was made for relief of him in remainder against particular tenants, for lives or years, that assigned over their estates, and took the profits, and then committed waste; and therefore this statute giveth an action of waste against them, being pernors of profits.

In all this course of statutes no relief is given to purchasers that come in by the party, but to such as come in by law: as demandants in *præcipes*, whether they be creditors, disseisees, or lessors, and lords[1] (and that only in case of mortmain). And note also, that they be all in cases of special covinous intents; as, to defeat executions, tenancy to the *præcipe*, and the statute of mortmain, or provisors.

From 11 H. VI. to 1 R. III. being a space of fifty years, there is a silence of uses in the statute book,

[1] Both Harl. MSS. give this reading, which has been omitted or blundered in all the Editions, and No. 6688. gives the obvious correction of "demandant" for "defendant" above.

which was at that time when, no question, they were favoured most. In 1 R. III. cap. 1. cometh the great statute for the relief of those that come in by the party: and at that time an use appeareth in his likeness; for there is not a word spoken of any taking of the profits, to describe a use by, but of claiming to an use. And this statute ordained that all feoffments, gifts, grants, &c. shall be good against the feoffors, donors, and grantors, and all other persons claiming only to their use: so as here the purchaser was fully relieved; and *cestui que use* was *obiter* enabled to change his feoffees, because there were no words in the statute of feoffments, grants, &c. upon good consideration, but generally. In H. VII.'s time new statutes were made for further help and remedy to those that came in by act in law; as 1 H. VII. cap. 1. a *formedon* is given without limitation of time against *cestui que use;* and *obiter*, because they make him tenant, they give him the advantage of a tenant, as of age and voucher over. 4 H. VII. cap. 17. the wardship of the heir of *cestui que use* dying, and no will declared, is given to the lord as if he had died seised in demesne; and *reciprocè* action of waste given to the heir against the guardian, and damages if the lord were barred in his writ of ward; and relief is likewise given unto the lord, if the heir, holding by knight service, be of full age. In 19 H. VII. cap. 15. there is relief given in three cases: first, to the creditors upon matter of record, as upon recognisance, statute, or judgment, whereof the two former were not aided at all by any statute, and the last was aided by the statutes of 50 E. III. and 2 R. II. only in cases of sanctuary men; secondly, to the lords in socage for their reliefs and heriots upon death,

which was omitted in the 4 H. VII.; and lastly, to the lords of villains, upon the purchase of their villains in use. In 23 H. VIII. cap. 10. a further remedy was given in a case like unto the case of mortmain. For in the statute of 15 R. II. remedy was given where the use came *ad manum mortuam*, which was when it came to some corporation: now, when uses were limited to a thing apt or worthy,[1] and not to a person or body,— as to the reparation of a church, or an *obit*, or to such guilds or fraternities as are only in reputation and not incorporate, as to parishes, — the case was omitted; which by this statute is remedied, not by way of giving entry unto the lord, but by way of making the use utterly void. Neither doth the statute express to whose benefit the use shall be made void, either the feoffor or feoffee, but leaveth it to law, and addeth a *proviso* that uses may be limited twenty years from the gift, and no longer.

This is the whole course of the statute law touching uses, before this statute. And thus have I set forth unto you the nature and definition of an use; the differences of trusts, the parts of an use, and the qualities of it, and by what rules and learning uses shall be guided and ordered; a precedent of them in other laws, and some resemblance of them in our law; the causes of the springing and spreading of uses; the continuance of them; and the proceeding that they have had both in common and statute law. Whereby it may appear, that an use is no more but a general trust, when a man will trust the conscience of

[1] This is the reading of Mr. Montagu's text, also of Harl. MS. 6688., which latter seems to me the most trustworthy we have. The common reading is "act, or work," which some may prefer. The general sense is not affected. For "parishes," below, the MS. reads "priests."

another better than his own estate and possession; which is an accident or event of human society which hath been and will be in all laws, and therefore was at the common law which is common reason. For as Fitzherbert saith in the 14 H. VIII. 4. common reason is common law, and not conscience; but common reason doth define that uses should be remedied in conscience and not in courts of law, and ordered by rules in conscience and not by strait cases of law; for the common law hath a kind of a rule and survey over the chancery, to determine what belongs to the chancery. And therefore we may truly conclude, that the force and strength that an use had or hath in conscience is by common law; and the force that it had or hath by common law is only by statutes.

## THE OPENING OF THE STATUTE.

Now followeth, in time and matter, the consideration of this statute, which is our principal labour; for those former considerations which we have handled serve but for introduction.

This statute, as it is the statute which of all others hath the greatest power and operation over the inheritances of the realm, so howsoever it hath been by the humour of the time perverted in exposition, yet itself is the most perfectly and exactly conceived and penned of any law in the book, induced with the most declaring and persuading preamble, consisting and standing upon the wisest and fittest ordinances, and qualified with the most foreseeing and circumspect savings and provisoes, and lastly, the best pondered in all the words and clauses of it of any statute that I find.

But before I come to the statute itself, I will note unto you three matters of circumstance: 1. the time of the statute: 2. the title of it: 3. the precedent or pattern of it.

1. For the time, it was made in 27 H. VIII. when the kingdom was in full peace and a wealthy and flourishing estate; in which nature of time men are most careful of the assurances of their possessions, as well because purchases are most stirring as, again, because the purchaser, when he is full, is no less careful of his assurance to his children and of disposing that which

he hath gotten, than he was of his bargain and compassing thereof.

About that time likewise the realm began to be enfranchised from the tributes of Rome, and the possessions that had been in mortmain began to stir abroad; for this year was the suppression of the smaller houses of religion: all tending to plenty and purchasing. And this statute came in consort with divers excellent statutes made for the kingdom in the same parliament; as the reduction of Wales to a more civil government, the re-edifying of divers cities and towns, the suppressing of depopulation and inclosures; all badges of a time that did extraordinarily flourish.

For the title, it hath one title in the roll, and another in course of pleading. The title in the roll is no solemn title, but an apt title, viz. An act expressing an order for uses and wills;—it was time, for they were out of order. The title in course of pleading is, *Statutum de usibus in possessionem transferendis.* Wherein Walmsly, Justice, noted well, 40 Reginæ, that if a man look to the working of the statute he would think it should be turned the other way, *de possessionibus ad usus transferendis;* for that is the course that the statute holdeth, to bring possession to the use. But the title is framed not according to the working of the statute, but according to the scope and intention of the statute; *nam quod primum est intentione ultimum est opere;* and the intention of the statute was by carrying the possession to the use to turn the use into a possession. For the words are not *de possessionibus ad usus*, but *in usus transferendis;* and as the grammarian saith, *præpositio "ad" denotat motum lationis, sed præpositio "in" cum accusativo denotat*

*motum alterationis;* and therefore Kingsmill, Justice, in the same case, saith that the meaning of the statute was to make a transubstantiation of the use into a possession. But it is to be noted that titles of acts of parliament, severally, came in but in 5 H. VIII.; for before that time there was but one title of all the acts made in one parliament; and that was no title neither, but a general preface of the good intent of the King, but now it is parcel of the record.

For the precedent of this statute upon which it is drawn, I do find it 1 R. III. c. 5., where you may see the very mould whereon this statute was made; where the said King having been infeoffed, before he usurped, to uses, it was ordained that the land whereof he was jointly infeoffed should be in his co-feoffees as if he had not been named; and where he was solely infeoffed, it should be in *cestui que use*, in estate, as he had the use.

Now to come to the statute itself.

The statute consisteth, as other laws do, upon a preamble, the body of the law, and certain savings and provisoes. The preamble setteth forth the inconvenience; the body of the law giveth the remedy; and the savings and provisoes take away the inconveniences of the remedy. For new laws are like the apothecaries' drugs; though they remedy the disease, yet they trouble the body: and therefore they use to correct them with spices. So it is not possible to find a remedy for any mischief in the commonwealth, but it will beget some new mischief; and therefore they spice their laws with provisoes to correct and qualify them.

The preamble of this law was justly commended by Popham, Chief Justice, in 36 Re- The Preamble.

ginæ, where he saith that there is little need to search and collect out of cases before the statute what the mischief was which the scope of the statute was to redress; because there is a shorter way offered us, by the sufficiency and fulness of the preamble. And because it is indeed the very level which doth direct the very ordinance of the statute, and because all the mischief hath grown by expounding of this statute as if they had cut off the body from the preamble; therefore it is good to consider it and ponder it thoroughly.

The preamble hath three parts: first, a recital of the principal inconvenience, which is the root of all the rest: secondly, an enumeration of divers particular inconveniences, as branches of the former: thirdly, a taste or brief note of the remedy that the statute meaneth to apply.

The principal inconvenience, which is *radix omnium malorum*, is the digressing from the grounds and principles of the common law, by inventing a means to transfer lands and inheritances without any solemnity or act notorious: so as the whole statute is to be expounded strongly towards the extinguishment of all conveyances whereby the freehold or inheritance may pass without any new confections of deeds, executions of estate, or entries; except it be where the estates be of privity and dependence one towards the other; in which case, *mutatis mutandis*, they might pass by the rules of the common law.

The particular inconveniences by the law rehearsed may be reduced to four heads: first, that these conveyances in use are weak for consideration: secondly, that they are obscure and doubtful for trial: thirdly, that they are dangerous for want of notice and publi-

cation: fourthly, that they are exempted from all such titles as the law subjecteth possession unto.

The first inconvenience lighteth upon heirs: the second upon jurors and witnesses: the third upon purchasers: the fourth upon such as come in by gift in law: all which are persons that the law doth principally respect and favour.

For the first of these, there are three impediments to the judgment of man in disposing justly and advisedly of his estate: first, trouble of mind; secondly, want of time; thirdly, of wise and faithful counsel about him: and all these three the statute did find to be in the disposition of an use by will; whereof followed the unjust disinherison of heirs. Now the favour of the law unto heirs appeareth in many parts of the law; as the law of descent privilegeth the possession of the heir against the entry of him that hath right by the law; no man shall warrant against his heir, except he warrant against himself; and divers other cases too long to stand upon. And we see the ancient law in Glanvill's time was, that the ancestor could not disinherit his heir by grant or other act executed in time of sickness; neither could he alien land which had descended unto him except it were for consideration of money or service, but not to advance any younger brother without the consent of the heir. Gl. b. 7. ch. 1. fol. 44.

For trials, no law ever took a straiter course, that evidence should not be perplexed nor juries inveigled, than the common law of England; as, on the other side, never law took a more precise and strait course with juries, that they should give a direct verdict. For whereas in a manner all laws do give the triers, or ju-

rors, which in other laws are called judges *de facto*, a liberty to give *non liquet*, that is, no verdict at all, and so the cause to stand abated; our law enforceth them to a direct verdict, general or special: and whereas other laws accept of plurality of voices to make a verdict, our law enforceth them all to agree in one: and whereas other laws leave them to their own time and ease, and to part and to meet again; our law doth duress and imprison them in the hardest manner, without light, or comfort, until they be agreed. In consideration of which straitness and coercion, it is consonant that the law do require, in all matters brought to issue, that there be full proof and evidence: and therefore if the matter in itself be in the nature of simple contracts, which are made by parol without writing, it alloweth wager of law; in issue upon the mere right, which is a thing hard to discern, it alloweth wager of battail to spare jurors; if time have wore out the marks and badges of truth, from time to time there have been statutes of limitation, where you shall find this mischief of perjuries often recited; and lastly, which is the matter in hand, all inheritances could not pass but by acts overt and notorious, as by deed, livery, and record.

For purchasers *bonâ fide*, it may appear that they were ever favoured in our law: as, first, by the great favour of warranties which were ever for the help of purchasers, as where, by the law[1] in E. III.'s time, the disseisee could not enter upon the feoffee in regard of the warranty; so again the collateral warranty, which otherwise is a hard law, grew, no[2] doubt, only upon

[1] I do not know what this refers to, unless it be to some case in the Year Book.

[2] Some editions and MSS. have "in" instead of "no."

favour of purchasers; so likewise that the law doth take strictly rent charge, conditions, extents, was merely in favour of purchasers; so was the binding of fines at the common law, the invention and practice of recoveries to defeat the statute of intails; and many more grounds and learnings are to be found respecting the quiet possession of purchasers. And therefore, though the statute of 1 R. III. had provided for the purchaser in some sort, by enabling the acts and conveyances of *cestui que use*, yet, nevertheless, the statute did not at all disable the acts or charges of the feoffees; and so, as Walmsly, Justice, said, [42] Reginæ, they played at double hand, for *cestui que use* might sell, and the feoffee might sell, which was a very great uncertainty to the purchaser.

For the fourth point of inconvenience, towards those that come in by law, conveyances in uses were like privileged places or liberties: for as there the law doth not run, so upon such conveyances the law could take no hold, but they were exempted from all titles in law.

No man is so absolute owner of his possessions, but that the wisdom of the law doth reserve certain titles unto others; and such persons come not in by the pleasure and disposition of the party, but by the justice and consideration of law; and therefore of all others they are most favoured. And they are principally three: the King and lords, who lost the benefit of attainders, fines for alienations, escheats, aids, heriots, reliefs, &c.: the demandants in *præcipes*, either real, or personal for debt and damages, who lost the benefit of their recoveries and executions: and tenants in dower, and by the courtesy, who lost their estates and titles.

First for the King. No law doth endow the King or Sovereign with more prerogatives or privileges than ours: for it preserveth and exempteth his person from suits and actions, his possessions from interruption and disturbance, his rights from limitation of time, his patents from all deceits and false suggestions.

Next the King is the lord: whose duties and rights the law doth much favour, because the law supposeth the land did originally come from him; for until the statute of *Quia emptores terrarum*, the lord was not forced to distract or dismember his signiory or services. So, until 15 H. VII., the law was taken that the lord, upon his title of wardship, should oust a conuzee of a statute, or a termor. So again, we see that the statute of mortmain was made to preserve the lord's escheats and wardships.

The tenant in dower is so much favoured, as that it is the common bye-word in the law, that the law favoureth three things: life, liberty, dower. So in case of voucher, the feme shall not be delayed, but shall recover against the heir incontinent. So likewise of tenant by courtesy; it is called tenancy by the law of England, and therefore specially favoured as a proper conceit and invention of our law.

So again, the law doth favour such as have ancient rights. And therefore Littleton telleth us it is commonly said that a right cannot die: and that ground of law, that a freehold cannot be in suspense, showeth it well, insomuch that the law will rather give the land to the first comer, which we call an occupant, than want a tenant to a demandant's action: and again, the other ancient ground of law of *remitter* showeth that,

where the tenant faileth without folly in the demandant, the law executeth the ancient right.

To conclude, therefore, this part: when this practice of feoffments in use did prejudice and damnify all those persons that the ancient common law favoured, and did absolutely cross the wisdom of the law, which was to have conveyances considerate and notorious, and to have trial thereupon clear and not inveigled; it is no marvel that the statute concludeth that these subtle imaginations and abuses tended to the utter subversion of the ancient common laws of this realm.

The third part of the preamble giveth a touch of the remedy which the statute intended to minister, consisting in two parts: first, the extirpation of feoffments; secondly, the taking away of the hurt, damage, and deceit of uses.

Out of which words have been gathered two extremities of opinion.

The first opinion is, that the intent of the statute was to discontinue and banish all conveyances in use: grounding themselves both upon the words, that the statute doth not speak of the extinguishment or extirpation of the use, *viz.* by an unity of possession, but of an extinguishment or extirpation of the feoffment, &c. which is the conveyance itself; and secondly, out of the words "abuses and errors, heretofore used and accustomed," as if uses had not been at the common law, but had been only an erroneous device or practice. To both which I answer: to the former, that the extirpation which the statute meant was plain to be of the feoffee's estate, and not of the form of conveyances: and to the latter I say that, for the word "abuse," that may be an abuse of the law which is not against law;

as the taking long leases at this day of land *in capite* to defraud wardships is an abuse of law, but yet it is according to law: and for the word "errors" the statute meant by it, not a mistaking of the law, but a wandering or going astray or digressing from the ancient practice of the law into a bye-course: as, when we say *erravimus cum patribus nostris*, it is not meant of ignorance, but of perversity.

But to prove that the statute meant not to suppress the form of conveyances, there be three reasons which are not answerable. The first is, that the statute in every branch thereof hath words *de futuro*, "that are seised or hereafter shall be seised:" and whereas it may be said that these words were put in in regard of uses suspended by discontinuance, and so no present seisin to the use until a regress of the feoffees, that intendment is very particular; for commonly such cases are brought in by provisoes, or special branches, and not intermixed in the body of a statute, and it had been easy for the statute to have said, "or hereafter shall be seised upon any feoffment, &c. heretofore had or made."

My second reason is upon the words of the statute of inrolment, which saith, that no hereditaments shall pass, &c. or any use thereof, &c., whereby it is manifest that the statute meant to leave the form of conveyance with the addition of a farther ceremony.

The third reason I make is out of the words of the first proviso, where it is said that no primer seisin, livery, fine for alienation, &c. shall be taken for any estate executed by force of the statute, before the first of May, 1536, but they shall be paid for uses made and executed in possession for the time after; where the word "made" directly goeth to conveyances in use made

after the statute, and can have no other understanding; for the words "executed in possession" would have served for the case of regress.

And, lastly, which is more than all, if they had had any such intent, the case being so general and so plain, they would have had words express, that every limitation of use made after the statute should have been void. And this was the exposition, as tradition goeth, that a reader of Gray's Inn which read soon after the statute was in trouble for, — and worthily; who, I suppose, was Boyse,[1] whose reading I could never see; but I do now insist upon it, because now again some,[2] in an immoderate invective against uses, do relapse to the same opinion.

The second opinion, which I call a contrary extremity, is, that the statute meant only to remedy the mischiefs in the preamble recited, as they grew by reason of the divided use; and although the like mischief may grow upon the contingent uses, yet the statute had no foresight of them at that time, and so it was merely a new case not comprised.

Whereunto I answer, that I grant the work of the statute is to execute the divided use; and, therefore, to make any use void by this statute which was good before, though it do participate of the mischief recited in the statute, were to make a law upon a preamble without a purview, which were grossly absurd: but upon the question, what uses are executed, and what not, and whether out of the possession of a disseisor or other possessions out of privity, or not; there you shall guide

[1] "Boys" and "Boyse" appear as readers in Dugdale, and I presume are identical.

[2] I take Coke to be principally meant.

your exposition according to the preamble; as shall be handled in my next day's discourse.

And so much touching the preamble of this law.

The body of the law. For the body of the law, I would wish all readers that expound statutes to do as scholars are willed to do; that is, first, to seek out the principal verb; that is, to note and single out the material words whereupon the statute is framed: for there are, in every statute, certain words, which are veins where the life and blood of the statute is and runneth, and where all doubts do arise and issue forth; and all the rest of the words are but *literæ mortuæ*, fulfilling words.

The body of the statute consisteth upon two parts: first, a supposition, or case put, as Anderson, 36 Reginæ called it; secondly, a purview, or ordinance thereupon.

The cases of the statute are three, and every one hath his purview: the general case; the case of feoffees to the use of some of them; and the case of feoffees to the use or perceivance of rents or profits.

The general case is built upon eight material words: four on the part of the feoffees; three on the part of *cestui que use;* and one common to them both.

The first material word on the part of the feoffees is the word person. This excludes all abeyances; for Bro. feoffm. al use, pl. 40. there can be no confidence reposed but in a person certain. It excludes again all corporations; for they are enabled to an use certain; for note, on the part of the feoffee ever[1] the statute insists upon the word "person;" and on the part of *cestui que use*, it ever addeth "body politic."

[1] This, which Mr. Rowe conjecturally substituted for "feoffor over," is the reading of Harl. MS. 6688.

The second word material is the word "seised." This excludes chattels. The reason is, that the statute meant to remit the common law, and not to alter it. Chattels might ever pass by testament or by parol; therefore the use did not pervert them. It excludes rights; for it was against the rules of the common law to grant or transfer rights; and therefore the statute would not execute them. Thirdly, it excludes contingent uses,[1] because the seisin can but be to a fee-simple of an use, and, when that is limited, the seisin of the feoffee is spent: for Littleton tells us, that there are but two seisins, one, *in dominico ut de feodo*, the other, *ut de feodo*. And the feoffee by the common law could execute but the fee-simple to uses present, and no post uses: and therefore the statute meant not to execute them.

The third material word is "hereafter." That bringeth in conveyances made after the statute; it brings in, again, conveyances made before and disturbed by disseisin and recontinued after; for it is not said "infeoffed to use hereafter," but "seised."

The fourth word is hereditament; which is to be understood of those things whereof an inheritance may be, and not of those things whereof an inheritance is *in esse:* for if I grant a rent charge *de novo* for life to an use, this is good enough; yet there is no inheritance in being of this rent. This word likewise excludes annuities, and uses themselves; so that an use cannot be to an use.

The first word on the part of *cestui que use* is the word, "use, confidence, or trust;" whereby it is plain that the statute meant not to make "use" *vocabulum*

[1] See Note D. at the end.

*artis*, but it meant to remedy the matter, and not words: and in all the clauses it still carrieth the words.

The second word is the word "person" again: which excludeth all abeyances. It excludeth also all dead uses, which are not to bodies lively and natural; as the building of a church, the making of a bridge: but here, as was noted before, it is ever coupled with body politic.

The third word is the word "other." The statute meant not to cross the common law. Now at this time uses were grown into such familiarity, as men could not think of a possession but in course of use; and so every man was said to be seised to his own use, as well as to the use of others: therefore, because the statute would not stir nor turmoil possessions settled at the common law, it putteth in precisely this word "other," meaning the divided use and not the conjoined use. And this causeth the clause of joint feoffees to follow in a branch by itself; for else that case had been doubtful upon this word "other."

The words that are common to both are words expressing the conveyance whereby the use ariseth;[1] of which words those that breed any question are "agreement," "will," "otherwise;" whereby some have inferred that uses might be raised by agreement parol, so there were a consideration, [not][2] of money or other matter valuable, (for it is expressed in the words before, bargains, sale, and contract,) but of blood, or kindred: the error of which collection

Collard v. Collard, Cro. Eliz. 344.

[1] Here Harl. MS. 6688. ends.

[2] Mr. Rowe conjecturally adds this word, which seems necessary. I have found no authority for it.

appeareth in the word immediately following, viz. "will," whereby they might as well conclude that a man seised of land might raise an use by will, especially to any of his sons or kindred, where there is a real consideration, and by that reason mean, betwixt this statute and the statute of 32 H. VIII. of Wills, lands were devisable, especially to any man's kindred: which was clearly otherwise; and therefore those words were put in, not in regard of uses raised by those conveyances, but in regard of uses formerly transferred by those conveyances; for it is clear that an use *in esse* by simple agreement with consideration or without, or likewise by will, might be transferred; and then there was a person seised to an use by force of that agreement or will, viz. to the use of the assignee. And for the word "otherwise," it should by the generality of the word include a disseisin to an use; but the whole scope of the statute crosseth that, which was to execute such uses as were confidences and trusts; which could not be in case of disseisin; for if there were a commandment precedent, then the land was vested in *cestui que use* upon the entry; and if the disseisin were of the disseisor's own head, then no trust.

And thus much for the case or supposition of this statute: here followeth the ordinance and purview thereupon.

The purview hath two parts: the first *operatio statuti*, the effect that the statute worketh; and there is *modus operandi*, a fiction, or explanation how the statute doth work that effect. The effect is, that *cestui que use* shall be in possession of like estate as he hath in the use; the fiction *quomodo* is, that the statute will have the possession of *cestui que use*, as a new body, com-

pounded of matter and form, and that the feoffees shall give matter and substance, and the use shall give form and quality.

The material words in the first part of the purview are four.

The first words are "remainder and reverter." The statute having spoken before of uses in fee-simple, in tail, for life, or years, or otherwise,[1] addeth, "or in remainder or reverter:" whereby it is manifest, that the first words are to be understood of uses in possession. For there are two substantial and essential differences of estates: the one limiting the times (for all estates are but times) of their continuances; this maketh the difference of fee-simple, fee-tail, for life, or years; and the other maketh difference of possession, as remainder: all other differences of estate are but accidents, as shall be said hereafter.[2] These two the statute meant to take hold of, and at the words, "remainder and reverter," it stops; it adds not words, "right, title, or possibility," nor it hath not general words, "or otherwise;" whereby it is most plain that the statute meant to execute no inferior uses to remainder or reverter; that is to say, no possibility or contingencies; but estates only, such as the feoffees might have executed by conveyance made. Note also, the very letter of the statute doth take notice of a difference between an use in remainder and an use in reverter; which though it cannot be properly[3] (because it doth

[1] These words "or otherwise" stand, in the editions and MS., thus: "or otherwise in remainder or reverter." I have transposed them to the place they occupy in the statute.

[2] The passage is not extant.

[3] According to Bacon, then, it would seem, even after the statute, an use in remainder did not depend on the particular estate. See Notes A. and D.

not depend upon particular estates as remainders do, neither did then before the statute draw any tenures as reversions do,) yet the statute intends that there is a difference, when the particular use and the use limited upon the particular use are both new uses, in which case it is an use in remainder; and where the particular use is a new use, and the remnant of the use is the old use, in which case it is an use in reverter.

The next material word is "from henceforth;" which doth exclude all conceit of relation, that *cestui que use* shall [not][1] come in as from the time of the first feoffment to use; as Brudnell's conceit was in 14 H. VIII., that, if[2] the feoffee had granted a rent charge, and *cestui que use* had made a feoffment in fee by the statute of 1 R. III., the [latter] feoffee should have held it discharged, because the act of *cestui que use* shall put the feoffee in as if *cestui que use* had been seised from the time of the first use limited. And therefore the statute doth take away all such ambiguities, and expresseth that *cestui que use* shall be in possession from henceforth; that is, from the time of the parliament for uses then in being, and from the time of the execution for uses limited after the parliament. Bro. Feoffm. al use, 10.

The third material words are "lawful seisin, state, and possession;" not a possession in law only, but a seisin in fact; not a title to enter into the land, but an actual estate.

The fourth words are, "of and in such estates as

[1] I think this word should be left out. The meaning is, that in cases of feoffments before the statute and any intermediate charges, feoffments, &c. made by the feoffees, the statute should *not* relate back to avoid them.

[2] I have without authority changed "is" into "if," and inserted "latter" a little below.

they had in the use;" that is to say like estates, fee-simple, fee-tail, for life, for years, at will, in possession, and reversion; which are the substantial differences of estates, as was said before. But both these latter clauses are more fully perfected and expounded by the branch of the fiction of the statute, which follows.

This branch of fiction hath three material words or clauses. The first material clause is, that the estate, right, title, and possession, that was in such person, &c. shall be in *cestui que use:* for that the matter and substance of the estate of *cestui que use* is the estate of the feoffee, and more he cannot have. So as, if the use were limited to *cestui que use* and his heirs, and the estate out of which it was limited was but an estate for life, *cestui que use* can have no inheritance: so if, when the statute came, the heir of the feoffee had not entered after the death of his ancestor, but had only a possession in law, *cestui que use* in that case should not bring an assize before entry, because the heir of the feoffee could not. So that the matter whereupon the use must work is the feoffee's estate. But note here: whereas before, when the statute speaks of the uses, it spake only of uses in possession, remainder and reverter, and not in title or right; now, when the statute speaks what shall be taken from the feoffee, it speaks of title and right: so that the statute takes more from the feoffee than it executes presently in cases where there are uses in contingence, which are but titles.[1]

The second word is, "clearly," which seems properly and directly to meet with the conceit of *scintilla juris*, as well as the words in the preamble, of extirp-

[1] See Note E. at the end.

ing and extinguishing such feoffments: so as their estate is clearly extinct.

The third material clause is, "after such quality, manner, form, and condition, as they had in the use:" so as now, as the feoffee's estate gives matter, so the use gives form; and as in the first clause the use was endowed with the possession in points of estate, so [there it is endowed with the possession][1] in all accidents and circumstances of estate.

Wherein first note, that it is gross and absurd to expound the form of the use any whit to destroy the substance of the estate: as to make a doubt, because the use gave no dower or tenancy by the courtesy, that therefore the possession when it is transferred would do so likewise: no, but the statute meant such quality, manner, form, and condition, as [it] is not repugnant to the corporal presence and possession of the estate. Next for the word "condition," I do not hold it to be put in for uses upon condition, though it[2] be also comprised within the general words; but because I would have things stood upon learnedly, and according to the true sense, I hold it but for an explaining, or word of the effect as it is in the statute of 26 H. VIII. of Treasons; where it is said that the offenders shall be attainted of the overt fact by men of their condition:—in this place, that is to say of their degree and sort:—and so the word condition in this place is no more but in like quality, manner, form, and degree or sort; so as all these words amount but to *modo et forma*. Hence, therefore, all circum-

[1] Some such sense is required as: "here the possession is endowed with the qualities of the use."

[2] *Quære:* "that" or "they?"

stances of estate are comprehended; as sole seisin or joint seisin; by intierties or by moieties; a circumstance of estate to have age as coming in by descent, or not age as purchaser; a circumstance of estate descendable to the heir of the part of the father or of the part of the mother; a circumstance of estate conditional or absolute, remitted or not remitted, with a condition of intermarriage or without: all these are accidents and circumstances of estate, in all which the possession shall ensue the nature and quality of the use.

And thus much of the first case, which is the general case.

The second case, of the joint feoffees, needs no exposition; for it pursueth the penning of the general case. Only this I will note, that, although it had been omitted, yet the law upon the first case would have been taken as that case provided; so that it is rather an explanation than an addition. For turn that[1] case the other way, that one were infeoffed to the use of himself and others, (as that case is, that divers were infeoffed to the use of one of them;) I hold the law to be, that in the former case they shall be seised jointly; and so in the latter case *cestui que use* shall be seised solely: for the word "other" it shall be qualified by the construction of cases, as shall appear when I come to my Division. But because this case of co-feoffees to the use of one of them was a general case in the realm, therefore they foresaw it, expressed it precisely, and passed over the case *e converso*, which was but especial and rare. And they were loth

[1] *Quære:* "the?"

to bring in this case,[1] by inserting the word "only" into the first case, to have penned it "to the use only of other persons;" for they had experience what doubt the word "only" bred upon the statute of 1 R. III. After this second case, and before the third case of rents, comes in the two savings:[2] and the reason of it is worth the noting, why the savings are interlaced before the third case. The reason of it is, because the third case needeth no saving, and the first two cases did need savings. And [that][3] is the reason of that again: it is a general ground, that where an act of parliament is donor, if it be penned with an *ac si*, it needs[4] not a saving, for it is a special gift, and not a general gift which includes all rights. And therefore in 11 H. VII. where, upon the alienation of women, the statute entitles the heir or him in remainder to enter, you find never a saving,[5] because the statute gives entry not *simpliciter*, but within an *ac si* as if no alienation had been made, or if the feme had been naturally dead. Strangers that had right might have entered; and therefore no saving needs. So in the statute of 32 H. VIII. of leases, the statute enacts that the leases shall be good and effectual in law, as if the lessor had been seised of a good and perfect estate in fee-simple; and therefore you find no saving in the

[Delamere's case, Plowd. 350.]

[1] This is obscurely expressed: but Mr. Rowe seems rightly to understand Bacon to mean, "they were loth to make *three cases* by inserting the word 'only' into the first section, which would have made it more symmetrical; but they used words sufficient, probably, to include all cases in one, and then added the second case *ex abundanti*."

[2] I have substituted this for "second saving." If the original had the Arabic numeral the difference is very slight.

[3] *Quære:* "here" or "this?"

[4] "Needs" for "is," following Mr. Rowe.

[5] I have, with Mr. Rowe, substituted "saving" for "stranger."

statute; and so likewise of divers other statutes, where a statute doth make a gift or title good specially against certain persons, there needs no saving; except it be to exempt some of those persons, as in the statute of 1 R. III.

Now to apply this to the case of rents, which is penned with an *ac si*, namely, "as if a sufficient grant or other lawful conveyance had been made or executed by such as were seised;" why, if such a grant of a rent had been made, one that had an ancient right might have entered and have avoided the charge; and therefore no saving needeth: but the first and second cases are not penned with an *ac si*, but absolute, that *cestui que use* shall be adjudged in estate and possession, which is a judgment of parliament stronger than any fine, to bind all rights: nay, it hath farther words, *viz.* in lawful estate and possession, which maketh it the stronger [than any],[1] in the first clause; for if the words only had stood upon the second clause, *viz.* that the estate of the feoffee should be in *cestui que use*, then perhaps the gift should have been special, and so the saving superfluous.

And this note is very material in regard of the great question, whether the feoffees may make any regress; which opinion, (I mean, that no regress is left unto them,) is principally to be argued out of the saving; as shall be now declared. For the savings are two in number: the first saveth all strangers' rights, with an exception of the feoffees'; the second is a saving out of the exception of the first saving, *viz.* of the feoffees' in case where they claim to their own proper use. It had been easy in the first saving out of the statute,

[1] These words seem to have slipt in from above.

"other than such persons as are seised, or hereafter should be seised to any use," to have added these words, "executed by this statute;" or in the second saving to have added unto the words, "claiming to their proper use," these words, "or to the use of any other, not[1] executed by this statute:" but the regress of the feoffee is shut out between the two savings; for it is the right of a person claiming to an use, and not unto his own proper use. But it is to be noted, that the first saving is not to be understood as the letter implieth, that feoffees to use shall be barred of their regress in case that it be of another feoffment than that whereupon the statute hath wrought, but upon the same feoffment; as, if the feoffee before the statute had been disseised, and the disseisor had made a feoffment in fee to I. D. his use, and then the statute came: this executeth the use of the second feoffment; but yet the first feoffees may make a regress, and yet they claim to an use, but not by that feoffment upon which the statute hath wrought.

Now followeth the third case of the statute, touching execution of rents; wherein the material words are four:

First, "whereas divers persons are seised:" which hath bred a doubt that it should only go to rents in use at the time of the statute; but it is explained in the clause following, *viz.* "as if a grant had been made to them by such as are or shall be seised."

The second word is "profit:" for in the putting of the case, the statute speaketh of a rent, but after in the purview is added these words, "or profit."

[1] I have substituted "not" for "and."

The third word is *ac si*, "that they shall have the rent as if a sufficient grant or other lawful conveyance had been made and executed unto them."

The fourth words are the words of liberty or remedies attending upon such rent, "that he shall distrain, &c. and have such suits, entries, and remedies," — relying again with an *ac si*, — as if the grant had been made with such collateral penalties and advantages.

Now for the provisoes.

The provisoes. The makers of this law did so abound with policy and discerning, as they did not only foresee such mischiefs as were incident to this new law immediately, but likewise such as were consequent in a remote degree; and, therefore, besides the express provisoes, they did add three new provisoes, which are in themselves substantive laws. For, foreseeing that by the execution of uses wills formerly made should be overthrown, they made an ordinance for wills: foreseeing likewise that by execution of uses women should be doubly advanced, they made an ordinance for dowers and jointures: foreseeing again that the execution of uses would make frank-tenement pass by contracts parol, they made an ordinance for enrolments of bargains and sales. The two former they inserted into this law, and the third they distinguished into a law apart, but without any preamble, as may appear, being but a proviso to this statute.

Besides all these provisional laws, and besides five provisoes, whereof three attend upon the law of jointure, and two [concern, respectively, recognisances to the King's use and persons] [1] born in Wales, which are not material to the purpose in hand, there are six pro-

[1] Something like what I have inserted in brackets must have slipt out.

visoes which are natural and true members and limbs of the statute, whereof four concern the part of *cestui que use*, and two concern the part of the feoffees.

The four which concern the part of *cestui que use* tend all to save him from prejudice by the execution of the estate.

The first saveth him from the extinguishment of any statute or recognisance. As, if a man had an extent of a hundred acres, and an use of the inheritance of one; now the statute, executing the possession to that one, would have extinguished his extent, being intire, in all the rest: or as, if the conuzor of a statute, having ten acres liable to the statute, had made a feoffment in fee to a stranger of two, and after had made a feoffment in fee to the use of the conuzee and his heirs. And upon this proviso there arise three questions: First, whether this proviso were not superfluous, in regard that *cestui que use* was comprehended in the general saving, though the feoffees be excluded? Secondly, whether this proviso doth save statutes or executions, with an apportionment, or intire? Thirdly, (because it is penned indefinitely in point of time,) whether it shall go to uses limited after the statute, as well as to those that were in being at the time of the statute: which doubt is rather enforced by this reason, because there was [need thereof] for uses [in being] at the time of the statute; for that the execution of the statute might [not] be waived: but both possession and use, since the statute, may be waived.[1]

The second proviso saveth *cestui que use* from the charge of *primer seisin*, *liveries*, *ouster les mains*, and

[1] I have conjecturally added (in brackets) words which will give the sense that seems wanted.

such other duties to the King, with an express limitation of time: that he should be discharged for the time past, and charged for the time to come; making, namely, May 1536, to be *communis terminus*.

The third proviso doth the like for fines, reliefs, and heriots; discharging them for the time past, and speaking nothing of the time to come.

The fourth proviso giveth to *cestui que use* all collateral benefits of vouchers, aid-prayers, actions of waste, trespass, conditions broken, &c.,[1] which the feoffees might have had; and this is expressly limited for estates executed before 1° May 1536. And this proviso giveth occasion to intend that none of these benefits would have been carried to *cestui que use* by the general words in the body of the law, *viz.* that the feoffee's estate, right, title, and possession, &c.

For the two provisoes on the part of the terretenant, they both concern the saving of strangers from prejudice, &c. The first saves actions depending against the feoffees, that they shall not abate. The second saves wardships, liveries, and *ouster les mains*, whereof title was vested in regard of the heir of the feoffee, and this in case of the King only.

[1] I have substituted "&c." for "and."

## FIRST DIVISION ON THE STATUTE.[1]

THOUGH I have opened the statute in order of words, yet I will make my division in order of matter, *viz.:* The raising of uses; the interruption of uses; the executing of uses.

Again, the raising of uses doth easily divide itself into three parts: The persons that are actors in the conveyance to use; the use itself; the form of the conveyance.

Then is it first to be seen what persons may be seised to an use, and what not; and what person may be *cestui que use*, and what not; and what persons may declare an use, and what not.

The King cannot be seised to an use; no, not where he taketh in his natural body and to some purposes as a common person; and therefore, if land be given to the King and I. S. *pour terme de leur vies*, to the use of I. D., this use is void for a moiety. What persons may be seised to an use.

Like law is it, if the King be seised of land in the right of his Duchy of Lancaster, and covenant by his letters patent under the Duchy seal to stand seised to the use of his son; nothing passeth.

Like law, if King R. III. who was feoffee to divers

[1] Harl. MS. 829. f. 137. begins here and has the heading Lect. I. Mr. Spedding thinks the handwriting may well be that of a person who was also employed a good deal by Bacon when he was Attorney General.

uses before he took upon him the crown, had after he was King by his letters patent granted the land over; the uses had not been revived.

The Queen, (speaking not of an imperial Queen, but of a Queen by marriage,) cannot be seised to an use. Though she be a body enabled to grant and purchase without the King; yet, in regard of the government and interest the King hath in her possession, she cannot be seised to an use.

A corporation cannot be seised to an use, because their capacity is to an use certain; again, because they cannot execute an estate without doing wrong to their corporation or founder; but chiefly because of the letter of this statute, which, in every clause when it speaketh of the feoffee, resteth only upon the word "person;" but when it speaketh of *cestui que use*, it addeth "person or body politic."

Notwithstanding,[1] if a bishop bargain and sell lands whereof he is seised in the right of his see, this is good during his life: otherwise it is where a bishop in infeoffed to him and his successors, to the use of I. D. and his heirs: that is not good, no not for the bishop's life, but the use is merely void.

Bro. feoffm. al use, pl. 40. Contrary law of tenant in tail: for if I give land in tail by deed since the statute to A. to the use of B. and his heirs, B. hath a fee-simple, determinable upon the death of A. without issue.[2]

[1] This word is added from Harl. MS. 829.

[2] Mr. Rowe points out that this was the opinion of Manwood and others in two cases since the statute, 1 Dyer, 312 *a*, and 2 Leo. 16.: but that in *Lord Cromwell's case*, 2 Rep. 78., as well as in *Cooper v. Franklin*, Cro. Jac. 401., usually cited, the law was settled the other way. Lord Cromwell's case was at this time under discussion, and Bacon argued it for the defendant: but I do not see that his client was obviously interested in the ruling of this point one way or the other.

And like law, though more doubtful, before the statute: for the chief reason which bred the doubt before the statute was because tenant in tail could not execute an estate without wrong; but that, since the statute, is quite taken away, because the statute saveth no right of intail, as the statute of 1 R. III. did. And that reason likewise might have been answered before the statute, in regard of the common recovery.

A feme covert and an infant, though under years of discretion, may be seised to an use; for as well as land might descend now to them from a feoffee to use, so may they originally be infeoffed to an use. Yet if it be before the statute, and they had, upon a *subpœna* brought, executed their estate during the coverture or infancy, they might have defeated the same; but then they should have been seised again to the old use, and not to their own use: but since the statute no right is saved unto them.

If a feme covert or an infant be infeoffed to an use present since the statute, the infant or baron come too late to disagree or root up the feoffment; but if an infant be infeoffed to the use of himself and his heirs, and if I. D. pay such a sum of money, to the use of I. G. and his heirs, the infant may disagree, and overthrow the contingent use.

Contrary law, if an infant be infeoffed to the use of himself for life, the remainder to the use of I. S. and his heirs: he may disagree to the feoffment as to his own estate, but not to divest the remainder, but it shall remain to the benefit of him in remainder.

And yet, if an attainted person be infeoffed to an use, the King's title, after office found, shall prevent

the use, and relate above it: but until office the *cestui que use* is seised of the land.

Like law of an alien: for if land be given to an alien to an use, the use is not void *ab initio:* yet neither alien nor attainted person can maintain an action to defend the land, which is one part of the confidence.

The King's villain if he be infeoffed to an use, the King's title shall relate above the use: otherwise in case of a common person.

But if the lord be infeoffed to the use of his villain, the use never riseth, but the lord is in by the common law and not by the statute, discharged of the use.

But if the husband be infeoffed to the use of his wife for years, if he die the wife shall have the term, and it shall not inure by way of discharge; although the husband may dispose of the wife's term.

So, if the lord of whom the land is held be infeoffed to the use of a person attainted, the lord shall not hold by way of discharge of the use, because of the King's title, *annum, diem, et vastum.*

A person uncertain is not within the statute; nor any estate *in nubibus* or suspense executed. As, if I give land to I. S. the remainder to the right heirs of I. D. to the use of I. N. and his heirs, I. N. is not seised of the fee-simple but only of an estate *pour vie* of I. S. till I. D. be dead, and then in fee-simple.

Like law if, before the statute, I give land to I. S. *pour autre vie* to an use, and I. S. dieth living *cestui que vie*, whereby the freehold is in suspense: the statute cometh, and no occupant entereth: the use is not executed out of the freehold in suspense.

For the occupant, the disseisor, the lord by escheat, the feoffee upon consideration not having notice, and

all other persons which shall be seised to use not in regard of their persons but of their title; I refer them to my division touching disturbance and interruption of uses.

It followeth now to see what person may be a *cestui que use.*

What person may be a *cestui que use.*

The King may be *cestui que use;* but it behoveth both the declaration of the use and the conveyance itself to be matter of record, because the King's title is compounded of both. I say not appearing of record, but by conveyance of record. And therefore if I covenant with I. S. to levy a fine to him to the King's use, which I do accordingly, and this deed of covenant be not inrolled, and the deed also be found by office; the use vesteth not. *E converso:* If I covenant with I. S. to infeoff him to the King's use, and the deed be inrolled, and the feoffment also be found by office, the use vesteth not.[1] But if I levy a fine, or suffer a recovery to the King's use, and declare the use by deed of covenant inrolled; though the King be not party, yet it is good enough.

A corporation may take an use, and it is not material whether either the feoffment or the declaration be by deed; but I may infeoff I. S. to the use of a corporation and this use may be averred.

An use to a person uncertain is not void in the first limitation, but executeth not till the person be *in esse;* so that this is positive, that an use shall never be in abeyance, as a remainder may be, but ever in a person certain, upon the words of the statute, "and the estate of the feoffees shall be in him or them which have the use." And the reason is, because no con-

[1] This word is supplied by Harl. MS. 829.

fidence can be reposed in a person unknown and uncertain.[1]

And therefore, if I make a feoffment to the use of I. S. for life, and then to the use of the right heirs of I. D., the remainder is not in abeyance, but the reversion is in the feoffor *quousque*. So that upon the matter all persons uncertain in use are like conditions or limitations precedent.[2]

Like law, if I infeoff one to the use of I. S. for years, the remainder to the right heirs of I. D., this is not executed in abeyance, and therefore not void.

Like law, if I make a feoffment to the use of my wife that shall be, or to such persons as I shall nominate; though I limit no particular estate at all, yet the use is good, and shall in the interim return to the feoffor.

Contrary law, if I once limit the whole fee-simple of the use out of me, and part thereof to a person uncertain, it shall never return to the feoffor by way of fraction of the use; but look how it should have gone unto the feoffor if I begin with a contingent use, so it shall go to the next [in] remainder if I interlace a contingent use; both estates alike subject to the contingent use when it falleth.

As when I make a feoffment in fee to the use of my wife for life, the remainder to my first begotten son, (I having no son at that time,) the remainder to my brother and his heirs: if my wife die before I have any

[1] The reason seems irrelevant; but I have no hint for improving it. It seems rather to belong to the ante-penultimate paragraph of p. 342.

[2] I am not sure that I understand these last two words; and the whole sentence is rather strange. All I suppose to be meant is that such uses come into *esse* by devesting a vested estate, as does a condition. Perhaps "or" should be read "on."

son, the use shall not be in me, but in my brother; and yet, if I marry again and have a son, it shall divest from my brother, and be in my son; which is the skipping they talk so much of.[1]

So if I limit an use jointly to two persons, not *in esse*, and the one cometh to be *in esse*, he shall take the entire use; and yet if the other afterward come *in esse*, he shall take jointly with the former. As, if I make a feoffment to the use of my wife that shall be and my first begotten son for their lives, and I marry, my wife taketh the whole use: and if I afterwards have a son, he taketh jointly with my wife.

But yet where words of abeyance work to an estate executed in course of possession, it shall do the like in uses. As, if I infeoff A. to the use of B. for life, the remainder to C. for life, the remainder to the right heirs of B.; this is a good remainder executed.

So if I infeoff A. to the use of his right heirs, A. is in of the fee-simple, not by the statute but by the common law.

Now are we to examine a special point of disability of persons to take by the statute: and that upon the words of the statute, "where divers persons are seised to the use of other persons;" so that by[2] the letter of the statute no use is contained but where the feoffor is one, and *cestui que use* is another.

Therefore it is to be seen in what cases the same person shall be both seised to the use and *cestui que use*, and yet in by the statute; and in what cases they shall be diverse persons, and yet in by the common

[1] See observations on this passage in Note A. at the end.

[2] *Qu.*: in. Or perhaps the error is in the word "contained."

law. Wherein I observe unto you three things: First, that the letter is full in the point: secondly, that it is strongly urged by the clause of joint estates following: thirdly, that the whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate. Therefore the statute ought to be expounded that, where the party seised to the use and the *cestui que use* is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use to take effect by the common law.

As, if I give land to I. S. to the use of himself and his heirs, and if I. D. pay a sum of money, then to the use of I. D. and his heirs; I. S. is in by the common law, and not by the statute. Like law it is, if I give land to I. S. and his heirs, to the use of himself for life, or for years, and then to the use of I. D. or his heirs; I. S. is in of an estate for life, or for years, by way of abridgment of estate, in course of possession, and I. D. in of the fee-simple by the statute.

So if I bargain and sell my land after seven years; the inheritance of the use only passeth, and there remains in me an estate for years by a kind of subtraction of the inheritance or recouper[1] of my estate, but merely at the common law.

But if I infeoff I. S. to the use of himself in tail and then to the use of I. D. in fee, or covenant to stand seised to the use of myself in tail, and then to the use of my wife in fee; in both these cases the estate tail is executed by the statute: because an estate tail cannot be recouped out of a fee-simple, being a new estate and not like a particular estate for life or years,

[1] So MSS. The Editions have "occupation," and below "re-occupy."

which are but portions of the absolute fee. And therefore if I bargain and sell my land to I. S. after my death without issue, it doth not leave an estate tail to me, nor vesteth any present fee in the bargainee, but is an use expectant.

So if I infeoff I. S. to the use of I. D. for life and then to the use of himself and his heirs, he is in of the fee-simple merely in course of possession at common law, and as of a reversion, and not of a remainder.

Contrary law, if I infeoff I. S. to the use of I. D. for life, then to the use of himself for life, the remainder to the use of I. N. in fee: now the law will not admit fraction of estates; but I. S. is in with the rest by the statute.

So if I infeoff I. S. to the use of himself and a stranger; they shall be both in by the statute, because they could not take jointly, taking by several titles.

Like law, if I infeoff a bishop and his heirs to the use of himself and his successors, he is in by the statute in right of his see.

And as I cannot raise a present use to one out of his own seisin; so if I limit a contingent or future use to one being at the time of limitation not seised, but after [he] becometh seised, at the time of the execution of the contingent use it is the same reason and the same law, and upon the same difference which I have put before.

As, if I covenant with my son that after his marriage I will stand seised of land to the use of himself and his heirs, and before marriage I infeoff him to the use of himself and his heirs, and then he marrieth; he is in by the common law, and not by the statute. Like law of a bargain and sale. But if I had let to him for life

only, then he should have been in for life only by the common law, and of the fee-simple by the statute.

Now let me advise you of this, that it is not a matter of subtlety or conceit to take the law right, when a man cometh in by the law in course of possession, and where he cometh in by the statute in course of use; but it is material for the deciding of many cases and questions; as for warranties, actions, conditions, waivers, suspensions, and divers other purposes.

For example; a man's farmer committeth waste; after, he in reversion covenanteth to stand seised to the use of his wife for life, and after to the use of himself and his heirs; his wife dies: if he be in of his fee untouched, he shall punish the waste; if he be in by the statute, he shall not punish it.

So, if I be infeoffed with warranty, and I covenant with my son to stand seised to the use of myself for life, and after to him and his heirs; if I be in by the statute, it is clear my warranty is gone; if by the common law, it is doubtful.

So if I have an eigne right, and be infeoffed to the use of I. S. for life, then to the use of myself for life, then to the use of I. D. in fee. I. S. dieth. If I be in by the common law, I cannot waive my estate, having agreed to the feoffment; but if I be in by the statute, yet I am not remitted, because I am come in by my own act; but I may waive my use, and bring an action presently: for my right is saved unto me by one of the savings in the statute.

Now on the other side it is to be seen, where there is a seisin to the use of another person, and yet it is out of the statute: which is in special cases upon this ground; wheresoever *cestui que use* had remedy for the

possession by course of common law, there the statute never worketh. And therefore, if a disseisin were committed to an use, it is in him by the common law upon agreement. So if one enter as occupant to the use of another, it is in him till disagreement.

So if a feme infeoff a man *causâ matrimonii prælocuti*, she hath remedy for the land again by course of law.

And therefore in those special cases the statute worketh not. And yet the words of the statute are general, "where any person stands seised by force of any fine, recovery, feoffment, bargain and sale, agreement or otherwise:" but yet the sense is to be restrained for the reason aforesaid.

What persons may limit and declare an use.

It remaineth to show what persons may limit and declare an use. Wherein we must distinguish: for there are two kinds of declarations of uses; the one of a present use upon the first conveyance, the other upon a power of revocation or new declaration; the latter of which I refer to the division of revocation: now for the former.

The King upon his letters patent may declare an use; though the patent itself implieth an use, if none be declared.

If the King give lands by his letters patent to I. S. and his heirs to the use of I. S. for life, the King hath the inheritance of the use by implication of the patent; and no office needeth, for implication out of matter of record amounteth ever to matter of record.

If the Queen gave land to I. S. and his heirs to the use of the churchwardens of the church of Dale, the patentee is seised to his own use upon that confidence or intent; but if a common person had given land in

that manner, the use had been void by the statute of 23 H. VIII. c. 10. and the use had returned to the feoffor and his heir.

A corporation may take an use without deed, as hath been said before; but can limit no use without deed.

An infant may limit an use upon a feoffment, fine, or recovery; and he cannot countermand or avoid the use, except he avoid the conveyance.

Contrary law if an infant covenant in consideration of blood or marriage to stand seised to an use, the use is merely void.

If an infant bargain and sell his land[1] for commons or teaching, it is good with an averment. If for money, otherwise; if it be paid[2] it is voidable; if for money recited and not paid, it is void: and yet in the case of a man of full age the recital sufficeth.

Beckwith's case, 2 Co. 56.

If baron and feme be seised in right of the feme, or by joint purchase during the coverture, and they join in a fine; the baron cannot declare the use for longer time than the coverture, and the feme cannot declare alone, but the use goeth according to the limitation of law unto the feme and her heirs: but they may both join in declaration of the use in fee; and if they sever, then it is good for so much of the inheritance as they concur in; for that the law accounteth all one, as if they joined.

As, if the baron declare an use to I. S. and his heirs, and the feme another to I. D. for life, and then to I. S. and his heirs, the use is good to I. S. in fee.

And if upon examination the feme will declare the

[1] I have omitted the words "for money," which are in all editions and MSS. I have seen.

[2] So Harl. MS. 829. for the common reading "proved."

use to the judge, and her husband agree not to it, it is void, and the baron's use is only good; the rest of the use goeth according to the limitation of law.

[1] But if the husband discontinue the wife's land; although the feme join with him by deed, yet the husband's declaration is good of the inheritance.

When divers in remainder join with the tenant of the freehold in a lawful conveyance wherein all remainders do concur, and they sever in declaration of the use, every man's declaration shall be good for his own estate. But if they do not all concur that have estate, but that the conveyance is tortious in any part, then the declaration of the tenant of the freehold is only good. As, if tenant for life be, the remainder in tail, the remainder in fee; and they join in a fine and declare uses severally; tenant for life to I. S., tenant in tail to I. D., and tenant in fee to I. N.: I. S. hath *pour vie* of the tenant for life, I. D. hath to his heirs as long as tenant in tail hath heirs of his body, and I. N. hath the absolute fee.

Contrary law, if tenant for life or in tail and he in the remainder in tail join in a fine without him in the remainder in fee, and tenant in possession declareth to I. S. and tenant in remainder to I. D.: I. S.[2] hath the whole fee simple; and it shall not enure by way of declaration of use of several moieties, as if they had been jointly seised.

So, if tenant in possession and he in the remainder in fee join in a fine, where there is a mean remainder in tail who joineth not, and they sever in declaration; the tenant in possession's declaration is good only.

[1] From here to the end is taken from Harl. MS. 829. f. 140 b. It appears never to have been printed.

[2] The MS. omits I. S. here; obviously by a clerical error.

So, if tenant in tail suffer a common recovery, wherein he in the reversion is vouched and joins; yet the declaration of tenant in tail is only good.

But if tenant for life, the remainder in tail, be; and tenant for life suffer a common recovery, wherein he in remainder is prayed in aid or vouched; there the declaration is good, of tenant for life only for his life, and of tenant in tail for the rest: but if it had not been an immediate remainder in tail, then the tenant for life's declaration had been good for the whole fee-simple.

If two tenants join in conveyance and sever in declaration, it is good severally for their moieties.

But if disseisor and disseisee join in a fine and sever in the declaration of the use, the declaration of the disseisor is only good.

If the feoffee to use and *cestui que use* before the statute join in feoffment to one that hath notice, and sever in the declaration of the use; the declaration of *cestui que use* is only good.

The feoffor or grantor that hath the use is the only person that may declare the use, and the declaration of the feoffee is utterly void. As, if I make a feoffment in fee, and the feoffee by his deed declare it to be to the use of I. S.; it is void.

But you must intend this rule of those that are feoffor and feoffee upon the original conveyance, and not upon a perfective conveyance which was induced. As if I covenant that I will infeoff I. S. upon condition to re-infeoff me, or covenant that I will levy a fine with a *render* to myself, and this re-feoffment or this *render* shall be to the use of I. D.: now, upon the matter, I declare an use upon a conveyance wherein I was grantee or feoffee; but yet it is good. So, if I cov-

enant with divers persons, and the words are "It is covenanted and granted between the parties:" yet if the rest declare new uses before the execution of the estate, it is nothing: but if I declare new uses without their assent to it, it is a good countermand: as shall be more fully shewed in my division of countermands and revocations of uses.

# NOTES.

## NOTE A. (Page 284.)

BACON has nowhere told us what he considered to be the true result of Chudleigh's case; and I confess I have not been able fully to satisfy myself as to his opinion.

The majority of the judges, and Coke, the reporter, certainly maintained the doctrine of the *scintilla juris*; viz. that in all cases where there were limitations of uses not at the time vested, the ultimate execution of them depended on a certain right or vestige of estate remaining in the original feoffees, and was therefore liable to be suspended by any event which put this right in abeyance, and destroyed by anything which absolutely barred their re-entry. This doctrine, it may be observed, would apply equally to shifting and springing uses as to those in the nature of contingent remainders; the question in all cases would be, when the time or contingency arrived, whether the feoffees had then a right to enter, or were barred by their own act or otherwise.

This doctrine Bacon urged in his Argument, but I think there are indications that he doubted its soundness;[1] at all events, he emphatically repudiates it in this Reading as a "conceit.'

Neither does he in the least incline to the opinion of some of the judges (which was also Coke's, pp. 129b. and 132a.), that the decision tended to invalidate all limitations which are contrary to the rules of the common law: for the whole drift of this treatise is to maintain uses, not as "imitations of possession," but as guided by the intention of the settlor; and moreover he puts many cases of shifting uses in his Division.

[1] See his observations on the law before the statute, as remarked on below.

But neither is there any indication of his holding the doctrine that has ultimately prevailed, and founds itself, as to one branch, on Chudleigh's case; viz. that where the use limited is one that might take effect as a remainder at common law, it shall have the incidents of a common law remainder, and is liable to fail on the determination of the preceding estate; but that when it is in its creation independent of particular estates and therefore does not resemble a common law remainder, it shall, if not void at the first as a perpetuity, be indefeasible. There is no indication whatever of his having distinguished between these two classes of limitations, and there is one case at least (p. 344.) which absolutely negatives such a supposition. He there states that on a feoffment to the use of the feoffor's wife for life, remainder to his unborn child, remainder to B. in fee, although the wife die before the birth of this child and B. comes into possession; yet on the subsequent birth of a child by another wife the estate shall devest from B. and come to the child.

I think a comparison of this supposed case with Chudleigh's, viewed in connexion with some passages of Bacon's Argument, may help us to his real opinion.

In the supposed case the first estate determined naturally, and B. was in under the limitations of the settlement: in Chudleigh's case the trustees' estate was forfeited, and the plaintiff was in by wrong and without privity with the settlement. Now Bacon argued that "the statute succeeds in office to the feoffees," and unquestionably this remained his deliberate opinion in opposition to the theory of the *scintilla*. But he also argued that "the statute did not alter the law as to the raising of uses, but only to draw the possession after them," and that therefore as "a contingent use could not rise at common law if the possession of the feoffees was estranged, no more can it now." Now, putting these two passages together, the "estrangement of the possession of the feoffees" before the statute seems to answer to the estrangement of privity of estate at the time when the statute should (as expressed in other passages in the Argument, though with the intermixture of language adapted to the doctrine of the *scintilla* he was there supporting) receive the estate from the existing *cestui que use*, and deliver it over to the person entitled on the contingency. In short, I incline to think Bacon held that all uses not vested in possession or remainder at their creation stood on the same footing,

and were not affected by any act or omission of the feoffees to uses (whose functions were gone as soon as created), but were all liable to be barred by any acts of those who had the vested estates which operated to destroy or suspend those estates.

In his argument in Stanhope's case "of Revocation of Uses," of which the date is presumptively during his Solicitor-Generalship, and certainly later than 2 *Jac.*, he cites Chudleigh's case (under the name Freine *v.* Dillon) as an authority for the position that "it is safe so to construe the statute of 27 Hen. VIII., as that uses may be made subject to the rules of the common law," which corresponds well enough with the use now-a-days made of the case; but this was after Coke's report of this and Archer's case, and after many other decisions, and cannot help us much, I think, in settling Bacon's opinion in 42 Eliz.

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## Note B. (Page 293.)

Bacon's application of this principle to the decision of the "great and principal doubts" of his day is not extant. It seems to me clear that he must have expounded it to the maintenance, generally, of springing uses, &c., according to the intention of the settlor, which ought to guide "the private conscience of the feoffee;" and that the "general conscience of the realm" would be called in, partly to "consult with the rules of law, where the intention of parties did not specially appear," (which would exactly hit the final interpretation of Chudleigh's case); and partly perhaps to condemn and avoid attempts in fraud of the policy of the law, as was ultimately done in regard of perpetuities by setting a positive limit within which future uses not limited by way of remainder must rise. I suppose it to have been in aid of this latter function of chancery that he, just below, invokes the aid of parliament.

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## Note C. (Page 307.)

This observation has been thought inconsistent with that in p. 290., that "an use is no covin," the sense of the last-mentioned

passage being obscured in the editions by the wrong reading which followed. In Bacon's time and in his view, the point was not, I think, without some practical bearing. It was a question whether uses were to be looked upon as abuses and frauds on the policy of the law, which were only to be tolerated because so inveterate, but to be jealously watched and restrained; or whether they were essentially founded in the necessities of society and therefore sanctioned by "the common law, which is common reason," and were only accidentally ministerial to frauds and covins. Bacon adopts this latter view, and would accordingly give the statute a liberal interpretation. His definition of an use is: a general trust of the land, as distinguished from a "confidence" or special and temporary trust. But he here infers from history that what led to the habit of putting land into use — *i. e.* of permanently separating the equitable from the legal ownership — was the special unlawful, and not the special lawful, intent, — the covin, and not the confidence. And it is indeed obvious that an unlawful purpose could only be carried out by making the lawful ownership apparently general, with a secret understanding about the use to be made of it; whereas a legal purpose might have been always made apparent on the face of the deed of feoffment, and a re-entry provided for on the full performance or the neglect of it.

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## Note D. (Page 325.)

I UNDERSTAND neither the doctrine Bacon here intends to lay down, nor the arguments by which he supports it; and, so far as I have any apprehension of what may be meant, it seems to be out of place here. As the passage bears upon the interpretation of his views on the controversies of the day, I will state my difficulties at some length.

As to the doctrine itself there can be no doubt at all that Bacon did not mean that contingent uses in general are void in their creation since the statute, nor to deny that the statute meddles with them in some sense. Even those who held that, until the time for vesting, a *scintilla juris* remained in the feoffees on which the statute worked when it became an estate or right of entry, can hardly have denied that this *scintilla* was the creation of the stat-

ute; but Bacon strenuously denies that doctrine, and therefore either he must hold that the statute does its work at the first creation while the use is still contingent (converting it from a contingent use or equity to a contingent estate or title cognisable in the courts of common law); or, if it remain a mere equity until the time for vesting, still the statute must, in his view, have shifted the fiduciary liability, either putting it *in gremio legis* (as some of the judges have it) or (as I rather believe Bacon would say) making the successive owners of vested estates, while in privity, trustees to preserve the contingent use.

But if any such doctrine as this is meant, it should come further on, where indeed it is repeated (pp. 389. 343.) with an intelligible argument from other words of the statute in its support. Here Bacon is professedly dealing not with the description of uses, but with the nature of the possession on which the statute works, as limited by the word "seised."[1] As one cannot be seised of a chattel, so chattels are not within the statute; *ex. gra.*, if I grant a lease to A. to the use of B., this remains a trust for B. and is not executed as a legal estate in him. Again, one cannot be seised of a bare right, and therefore these are excluded: *ex. gra.*, if a disseisee bargained and sold the land to a stranger while out of possession, the legal right of entry would not pass from him to the stranger. So far all is clear and consistent. But if a third inference was to be drawn at all sounding like what we have here, it appears to me that it should have been that one cannot hold a contingency to an use, just as he has already laid down that an abeyance cannot be to an use: *ex. gra.*, as he tells us in his *Division*, that on a feoffment to A. for life with remainder to the right heirs of B., to the use of C. (which is an abeyance), C. will only presently take an estate for the life of A., so would he lay down the same law if the feoffment had been to A. for life with remainder to B. if he shall return from Rome (which would be a contingency). And this might be a fair inference from the fact that B. would not be "seised" *in dominico* or *ut de feodo*, and so fulfil the words of the statute, until he returned. But I cannot understand the argument that *because* of this word "seised" a contingent *use* cannot be executed *out of* a seisin in fee-simple.

[1] There is a corresponding passage in the *Argument* in *Chudleigh's* case; but it is there more rationally put, — from the words "seised to the use &c.," — that one cannot be seised to a non-existent use.

The reason which follows, why "the statute meant not to execute contingent uses" is one which he also alleges in the Argument. Before Popham and others had given their judgment, one can conceive that Bacon was unaware or had forgotten that such a contingent use as the one in that case — a contingent remainder to an unborn child — might have been limited at common law by the feoffee; but the repetition of the opinion here after that judgment, of which Bacon certainly had a full report before him, is puzzling. The only attempt at explanation I can make (and that not satisfactory to my own mind) is that the contingent use seemed to Bacon essentially distinct from the contingent remainder, inasmuch as the former allowed the subsequent estates to vest and acted as a shifting use to devest them afterwards when the contingency arose, whereas the latter made all subsequent estates, like itself, to be in abeyance: the feoffee, therefore, before the statute could not create legal estates with incidents similar to those of the contingent uses until the contingency arose. See in the Division, p. 343.

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## Note E. (Page 330.)

Here again I think there is a confusion between the estate of the feoffee and the right to the use. If any inference at all is to be drawn from the occurrence of the words "title" and "right" here, it would seem to be that (contrary to Bacon's former position) a right as well as an actual possession may be held to an use.

# USE OF THE LAW.

# PREFACE.

I HAVE already expressed my belief that this treatise is not Bacon's.

In point of external evidence the case stands thus:

1. The only two MSS. I am aware of, Harl. MS. 1201. and Sloane MS. 4263., have no name of the author. They are different texts, though more resembling each other than either does the first printed one.

2. The *imprimatur* for the first edition — at least it bears date the year of the first edition, — is given by Archbishop Sancroft, cited in Blackburn's edition of Bacon, as follows:

"June 3rd, 1629. Sam. Maunsell, utter barrister of the Middle Temple, having perused this book, attested it to be very useful to all young students of the law and worthy to be imprinted:" and then, "Lambethæ Junii 4° 1629, *ut in alienâ arte alieno nixus judicio, libelli hujus imprimendi potestatem facio.*

"Johannes Jefferay."

This does not seem to me to be the way in which a work known or supposed to come from such an author would be spoken of or licensed; and, accordingly,

3. The first shape in which it appeared in that same

year was anonymous, and (as appears by the preface) without any suspicion of the authorship, by way of companion to a fragment of Sir John Doderidge's *English Lawyer*. This latter is there entitled "*The Lawyers' Light:* or a due direction for the study of the law, &c., by the reverend and learned professor thereof, J. D.;" and the *Use of the Law* is "annexed for affinity of the subject." The Preface is also anonymous, and begins thus: "I present unto you two children, the one whereof hath an author unknown, the other a father deceased." Now Doderidge was already dead, and must have been easily recognisable as "J. D." He would seem therefore to be the author referred to in the second branch of the sentence; and hence I conclude again that the author of the other Tract was unknown.

4. Both these treatises were next published by other parties, the "Assignees of John Moore, Esqre.," separately, and in consecutive years; Doderidge's treatise, — now complete and with its new title, — in 1631, with a preface stating it "was heretofore obscurely printed by an imperfect copy from a then unknown author," and was now printed "in fair light by the author's own copy written (for the most part) with his own hand:" — all of which I extract to show that these publishers knew the value of an authentic pedigree when they could furnish it.

The other treatise, *The Use of the Law*, they published in 1630, annexed to the *Maxims*, then first published, but with no preface at all. There is a general title-page and also a particular one to each treatise; and that to *The Use of the Law* has "by the Lord Verulam, Viscount of St. Albans." Now this cannot

have been the title actually on a MS. coming, or textually copied, from Bacon's own Collections, unless we suppose it to have been written within the last few years of Bacon's life.[1] I do not think any one will believe, on the internal evidence, that it can be the product of his maturer years; and I therefore conclude that it was not from any MS. evidence, but on some other now unknown ground, that the Assignees of John Moore gave the authorship to Bacon.

5. It must however be said that the authorship so asserted seems to have been accepted without hesitation from that time forward, unless Archbishop Sancroft's note may be taken to imply a doubt. It is in Rawley's list at the end of the *Resuscitatio*, and the printed book was, with other of Bacon's then published works, given to (and now remains in) Gray's Inn Library, by Bacon's relations Nathaniel and Francis, in 1635.

The work is not mentioned in the *Commentarius Solutus;* but neither is the *Reading on Uses:* and the negative argument must not therefore be too much pressed. Still the inference seems to be that, if the work be genuine, it was either out of Bacon's hands or uncommenced in 1608.

This is, so far as I know, the whole external evidence on either side. It may be fairly summed up, I think, by saying that no MS. seems ever to have been seen wherein the work was other than anonymous; but that the second publishers, without alleging any reason, gave it out as Bacon's within four years after his death; and that this ascription has been acquiesced in.

[1] Generally, I think, late copies of Bacon's authentic works continue the "Mr. F. Bacon," or "Sir F. Bacon," of the originals they are taken from.

The internal evidence is, to me, nearly decisive against it; but this must be in a great measure matter for each man's personal impression, and I can only briefly state my own.

1. As to style: I do not think it would have been possible for Bacon to have written so many consecutive pages on any subject, however dry and technical, without some turns of expression, some illustrations, some hints of a range of thought beyond his immediate subject, which would at once be felt to be characteristic of the man; and I cannot perceive any one passage of the kind. The treatise is favourably distinguished from many others of that time by freedom from pedantic affectations of classical or scriptural learning and philosophy; but if it is free from the spurious pretence, it is equally so from the thing itself.

2. The matter of the treatise may, as Mr. Maunsell says, have been very useful for young students, but the method seems to be peculiarly unlike Bacon's, and indeed childish. In any known treatise of Bacon's, whatever else may be unfinished, the preface and introduction, the laying out of the plan and conception of the work, are perfect: it is obviously the first step he took, and he often went no farther; and if such preface was lost or was in fact never written, the body of the treatise might be aphoristic, but never ill planned. Here, in a work on the use of the law, *i. e.* its application to private rights, we have nothing proposed for discussion but wrongs of violence to the person, the ways in which men may dispose of (and, we must infer, acquire) property, and (perhaps) the law relating to slander: no such heading (to enlarge no farther) as that of wrongs to property. Then we

have an enumeration of some half dozen crimes and their punishment; and then a fresh passage to the constitution of courts of justice, and the power of constables and officers of the peace. Then we pass to the head of property in land; under which we have in the first rank, *special occupancy;* next (without any previous division of estates) the law of *descent.* Next, the whole doctrine of tenures is introduced as an accessory, — the law of *escheat,* viewed as a mode of acquiring land, being the principal subject; and then, under the title of *conveyance,* we get some general notions of the divisions of estates according to our law, beginning with leases for years, and passing on through estates tail to fee-simple; and, finally, — without any attempt at defining the difference between real and personal property, except *obiter* and at the very end of the treatise, in an enumeration of the things with which an executor may meddle, — we have the ways in which property in goods may be acquired. Surely Bacon could never, — at least after his school-boy days, — have composed a treatise on such a plan.

3. The historical or antiquarian views which occur are distinctly opposed to Bacon's authentic opinions. This treatise attributes all our laws and constitution to the Conqueror; and herein especially, 1st, the institution of constables, and 2ndly, of Shires, County Courts, Courts Leet, &c., all of which are alleged to have been erected subsequently to, and in ease of, the King's Bench; which latter court, moreover, is supposed itself to have first come into existence when the Conqueror grew tired of doing justice in his own person. Now not to dwell on the absurdity of all this, Bacon, when Attorney General, and again after his fall in his

propositions for a Digest of the Laws, asserts that "they are as mixt as our language, compounded of British, Roman, Saxon, Danish, Norman customs;" and in the *Answers to the questions proposed by Sir Alexander Hay*, he makes the institution of constables and division of the territory into Shires, &c., of Saxon or earlier origin.

While rejecting this treatise as Bacon's on these grounds, I may offer the suggestion that one of his commonplace books may have furnished some of the materials for it, and that this may account for the whole being put upon him.

The text here given is mainly from the two MSS. above mentioned; and where they differ I have generally preferred the Harl. MS. which seems to me the more genuine: the Sloane MS. is obviously corrected in its antiquarian paragraph, and I think not by the author. But I have noted some of the more important variations of the text, so that the reader may judge for himself.

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OF

THIS ENSUING TREATISE.

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# THE USE OF THE LAW.

THE use of the law consisteth principally in these two things: the one, to secure men's persons from death and violence: the other, to dispose the property of their goods and lands.[1]

For safety of persons, the law provideth that any man standing in fear of another may take his oath before a justice of peace, that he standeth in fear of his life; and the justice shall compel the other to be bound with sureties to keep the peace.

If any man beat, wound, or maim another, [or give out false words that may touch his name,] the law giveth [an[2] action of the case, for the slander of his name; and] an action of battery, and an appeal of maim, by which recompense shall be recovered to the value of the hurt and damage.

If any man kill another with malice, the law giveth an appeal to the wife of the dead, if he had any, or to the next of kin that is heir in default of a wife; by

[1] The printed edition has "three things," the "third" being "for preservation of their good names from shame and infamy."

[2] The parts in brackets are omitted in Sloane MS.; and the form of the sentence, in which the damages seem grammatically attributable only to the action of battery, &c., inclines me to think that these are additions.

which appeal the offender convicted is to suffer death and to lose all his lands and goods. If the wife or heir will not sue, or be compounded withal, yet the King is to punish the offence by indictment or presentment of a lawful inquest, and trial of the offender before competent judges: whereupon being found guilty, he is to suffer death and lose his lands and goods.

If one man kill another upon a sudden quarrel, this is manslaughter; for which the offender must die, except he can read; and if he can read, yet must he lose his goods and be burnt in the hand, but lose no lands.

If a man kill another in his own defence, he shall not lose his life nor his lands; but he doth lose his goods, except the party slain did first assault him, to kill or trouble him by the highway side, or in his own house; and then he shall lose nothing.

If a man kill himself, all his goods and leases are forfeited, but not his lands.

If a man kill another by misfortune, as shooting an arrow at a butt or mark, or casting a stone over a house, or the like, he is to lose all his goods and leases, but not life or lands.

If a horse, or beast, or cart, or any other thing do kill a man, the horse, beast, cart, or other thing whose motion is used to the death, is forfeited to the crown, and is called a deodand and usually granted and allowed by the King to some Bishop his Almoner, as goods are of those that kill themselves.

The cutting out of a man's tongue or putting out his eyes maliciously is felony; for which the offender is to suffer death and lose his lands and goods.

But for that all punishment is for example's sake, it is good to see the means whereby offenders are drawn to their punishment.

And first for matter of the peace:

The ancient laws of England planted here by the Conqueror (from whom, and not above, we derive our laws, he having subdued all the former laws),[1] were, that there should be officers of two sorts in all the parts of this realm to preserve the peace: the one *constabularii pacis*, the other *conservatores pacis*. The constable's office was, to arrest the parties that he had seen breaking the peace or ready to break the peace, or was truly informed by others, or their confession, had freshly broken the peace: which persons he might imprison in the stocks or in his own house, as their quality required, until they had been bound with sureties by obligation to the King to keep the peace; which obligation was to be sealed and delivered to the constable to the use of the King; and that the constable was to send this obligation to the King's Exchequer or Chancery, from whence process should be awarded to levy the debt, if the peace were broken.

But the constable could not arrest any, nor make any put in bond upon complaint of threatening, except he had seen them break the peace, or had come freshly after the peace was broken.

Also, these constables did keep watch about the town for the apprehension of rogues and vagabonds, night-walkers, eves-droppers, scolds, and such like, and such as did go armed. And the constables raise and follow

[1] The printed text omits the parenthetic sentence.

hue and cry against murderers, manslayers, thieves, and robbers.

Of this office of constable there were high constables and petty constables; high constables, two of every hundred; petty constables, one in every village. They were in ancient time all appointed by the sheriff of the shire yearly, in the court called the Sheriff's Turn, and there they received their oath. But at this day they are appointed and sworn either in the Law-day of that precinct wherein they serve, or else the high constables in the sessions of the peace.

The Sheriff's Turn is a court very ancient, incident to his office, and began upon this occasion.

At the first[1] the Conqueror taking upon him to do justice in his own person, found that he could not attend to it, and hereupon erected his Court called the King's Bench, appointing men studied in the knowledge of his laws to execute justice as substitutes to him in his name; which men are to be named *Justiciarii ad placita coram Rege tenenda assignati:* one of them being *Capitalis Justiciarius* called to his place by the King's writ; the rest in number as pleaseth the king, (of late but three *Justiciarii*,) holding by patent.

In this court every man above twelve years old was to take his oath of allegiance to the King were he Norman or Saxon: also, if he were a freeman and not bond,[2] he was to put in pledges for his allegiance to the King: if he were bond, then his lord was to answer for him. In this court constables were appointed and

[1] The printed text has: "it was erected by the Conqueror and called the King's Bench."

[2] "bound" in MSS.; but I take the meaning to be bondsman, and have adopted the modern spelling.

sworn; breakers of the peace punished by fine and imprisonment; the parties beaten or hurt recompensed upon complaints with damages; all appeals of murder, maim, or robbery, decided; contempts against the crown, public annoyances against the people, treasons and felonies, heard and determined; and all other matters of wrongs for lands or goods between party and party.[1]

But the King seeing the realm grow daily more populous and that this one court could not dispatch all, did first ordain that his marshal should keep a court for controversies arising within the verge, which is within twelve miles of the chief tunnel[2] of the court.

But this Court did but ease the King's Bench in matters only concerning debts, covenants, and such like, of those of the King's household only, never dealing in breaches of the peace or concerning the crown by any other persons, or any pleas of lands. Insomuch as the King, for farther ease, having divided this kingdom into counties, and committing the charge of every county to a count, *comes*, or earl, did direct that those earls, within their limits, should look to the matters of the peace, and take charge of the constables, and reform public annoyances, and swear the people to the crown, and take pledges of the freemen for their allegiance. For which purpose the count did once every year keep a court, at which all the people of the county except women, clergy, children under twelve, and aged above sixty, did appear to give or renew their pledges

[1] The Sloane MS. in this place shows the hand of a corrector who was aware the Sheriff's Turn was not a substitute for the King's Bench, by making sundry clumsy additions to the text as it stands in Harl. MS.

[2] "tenell" is the word used in 2 stat. 13 Rich. II. c. 3., and the translation in Ruffhead's *Statutes* is "lodging."

of allegiance. And that court was called *Visus franci plegii*, a View of the Pledges of Freemen, or, *Turna Comitatus*.

At which meeting or court there fell, by occasion of so great assemblies, much bloodshed, scarcity of victuals, mutinies, and the like mischiefs which are incident to the congregations of people; by which the King was moved to allow a subdivision of every county into hundreds, and every hundred to have a court, whereunto the people of that hundred should be assembled twice a year for survey of pledges, and use of that justice that was exercised in the former grand court for the county: and the count or earl appointed a bailiff under him to keep these hundred courts.

But in the end, the Kings of this realm found it necessary to have all execution of justice immediately from themselves, by such as should be more bound than earls were to that service and readily subject to correction for their negligence or abuse, and therefore took to themselves the appointing of sheriffs yearly in every county, calling them *vicecomites*, and to them directed such writs and precepts for executing justice in the county as fell out needful to have dispatched, committing to the sheriff *custodiam comitatus;* by which the earls were spared of their toil and labour, and it was laid upon the sheriffs. So as now the sheriff doth all the King's business in the county; that is to say, he is judge of this grand court for the county, and it is now called the Sheriff's Turn; and also of all hundred courts not given away from the crown.

He hath another court, called the County court belonging to his office, wherein men may sue monthly for debts or damages under forty shillings, and may have

writs to replevy their cattle distrained and impounded by others, and there try the cause of the distress; and by a writ called *justicies*, a man may sue for any sum; and in this court the sheriff, by the King's writ called an *exigent*, doth proclaim men sued in courts above to render their bodies, or else they be outlawed.

The sheriff doth serve all the King's writs of process, be they summons or attachments, to compel men to appear to answer the law; and all writs of execution of the law according to judgments of superior courts, for taking of men's goods, lands, or bodies, as the case requireth.

[1] Of these hundred courts there is a jurisdiction known and certain; and that is, first, to deal in such things as the sheriff in his Turn might do. And they be in common speech called Law-days or Leets, to be kept twice a year. But the content, precinct, and limit of the court is uncertain, for that all hundreds be not equal nor guided by any certain rule of content, but long since allotted out and by use to this day well known in their bounds, some containing in them divers villages, some fewer.

The hundred courts were most of them granted to religious men, noblemen, and others of great place. And also many men of good quality have obtained by charter, and some by usage, within manors of their own, the liberty of keeping Law-days, and to use there the justice appertaining to a Law-day.

Whosoever is lord of the hundred courts is to appoint the two high constables of the hundred, and also is to appoint in every village a petty constable, with a tithing man to attend in his absence, and to be at

[1] This is not in the printed text, and does not seem well fitted in.

his command when he is present, in all services of his office, for his assistance.

There have been by use and statute law, besides surveying pledges of freemen, and giving the oath of allegiance, and making constables, many additions of power and authority given to the stewards of Leets and Law-days to be put in ure in their courts. As for example, they may punish innkeepers, victuallers, bakers, brewers, butchers, poulterers, fishmongers, and tradesmen of all sorts, selling at under weight or measure, or at excessive prices, or things unwholesome, or ill made, in deceit of the people. They may punish those that stop, straiten, or annoy the highways, or do not, according to the provision enacted, repair or amend them, or divert water courses, or destroy fry of fish, or use engines or nets to take deer, conies, pheasants, fowl, or partridges, or build pigeon houses (not being lord of the manor, nor parson of the church). They may also take presentment upon oath of the twelve sworn jury before them of all manner of felonies, but they cannot try the malefactors; only they must by indenture deliver over these presentments of felony to the judges, when they come their circuits into that county.

All these things before mentioned are in use and exercised as law at this day, concerning the sheriffs' Law-days and Leets, and the offices of high constables, petty constables, and tithing men; howbeit, with some further additions by statute laws, laying charge upon them of collecting taxation for the poor, for soldiers, and the like, and dealing without corruption, and the like.

Conservators of the peace in ancient times were certain which the King in every county did assign to

see the peace maintained; and they were called to the office by the King's writ, to continue for term of their lives, [or at the King's pleasure.] [1]

For this service, choice was made of the best men of calling in the country, and but few in a shire.

They might bind any man to keep the peace, and to good behaviour, by recognizance to the King with sureties; and might by warrant send for the party, directing their warrant to the sheriff or constable as they please, to arrest the party and bring him before them. This they used to do when complaint was made by any man that stood in fear of another, and so took his oath; or else, where the conservator did himself, without complaint, see the disposition of any man inclined to quarrel and breach of the peace, or to misbehave himself in some outrageous course of force or fraud, there by his own discretion he might send for such a fellow, and make him find sureties of the peace or good behaviour, as he should see cause; or else commit him to the gaol if he refused.

The judges of the King's Bench [2] at Westminster, barons of the Exchequer, master of the rolls, and justices in eyre and assizes in their circuits, were all, without writ, conservators of the peace by their office in all shires of England, and so do continue to this day. But now conservators of the peace by writ are out of use; for that in lieu of them there are ordained justices of peace, assigned by the King's commission in every county, which are removeable at the King's pleasure; and the power of placing and displacing justices of the

[1] This is omitted in Sloane MS.

[2] The printed text and Sloane MS. have "either bench." It will be observed that the institution of the Common Pleas is described as subsequent.

peace is by use delegated from the King to the Chancellor.

That there should be justices of peace by commission, it was first enacted by a statute made 1 Edward III. and their authority augmented by many statutes since made in every King's reign.

They are appointed to keep four sessions every year; that is to say, every quarter one. This session is a sitting time to assemble and dispatch the affairs of their commission. They have power to hear and determine in their sessions all felonies, breaches of the peace, contempts, and trespasses, so far as to fine the offender to the crown, but not to award recompence to the party grieved. They are to suppress riots and tumults; to restore possessions forcibly taken away, to examine all felons apprehended and brought before them; to see impotent poor people or maimed soldiers provided for according to the laws; and rogues, vagabonds, and beggars punished. They are to [license and[1]] suppress alehouses, badgers[2] of corn and victuals, and to punish forestallers, regrators, and engrossers.

Through these, in effect, run all the county services to the crown; as taxation of subsidies, mustering men, arming them, and levying forces by commission or precept from the King. Any of these justices, upon oath taken by a man that he standeth in fear that another will beat him, or kill him, or burn his house, are to send for the party by warrant of attachment directed to the sheriff or constable, and they are to bind the

[1] Harl. MS. has "to cease and suppress:" Sloane MS. omits the part in brackets. The licensing was not at common law but introduced by statute 5 and 6 Ed. VI. c. 25.

[2] Stat. 5 Eliz. c. 12.

party with sureties by recognizance to the King to keep the peace, and also to appear at the next sessions of the peace. At which next sessions, when every justice of peace hath there delivered in all his recognizances so taken, then the parties are called and the cause of binding to the peace examined; and both parties being heard, the whole bench is to determine as they see cause, either to continue the party still bound, or to discharge him.

These justices at the sessions are attended with the constables and bailiffs of all hundreds and liberties within the county, and with the sheriff or his deputy, to be employed as occasion shall serve in executing the precepts and directions of the court. They proceed in this sort: the sheriff doth summon twenty-four discreet men, freeholders of the county; whereof some sixteen are selected and sworn, and have their charge to serve as the grand jury, to enquire and present all offences which the justices can deal in: to whom all persons grieved prefer Bills of Indictment; and they being found and presented by the grand jury, the party indicted is to traverse the indictment, which is to deny it to be true, or else to confess it, and so submit himself to be fined as the court shall think meet, regard had to the offence, except the punishment be certainly appointed, as often it is, by special Acts of Parliament.

The justices of peace are many in every county. And to them are brought all traitors, felons, and other malefactors of any sort upon their first apprehension in the county; and that justice to whom they are brought examineth them, and heareth their accusation, but judgeth not upon it; only if he find the suspicion but light, then he taketh bond with sureties of the accused to ap-

pear either at the next assizes, if it be matter of treason or felony, or else at the quarter sessions, if it be concerning riot, misbehaviour, or some other small offence. And he also bindeth to appear there and give testimony and prosecute the accusation all the accusers and witnesses; and so setteth the party at large. And at the assizes or sessions, as the case falleth out, he certifieth the recognizances taken of the accused, accusers, and witnesses, who being all there called, and appearing, the cause against the accused is dealt in according to law for his clearing or condemning.

But if the party apprehended seem, upon pregnant matter in the accusation and examination, to the justice to be guilty, and the offence heinous, or the offender taken with the *mainour*, then the justice is to commit the party by his warrant, called a *mittimus*, directed to the gaoler of the common gaol of the county, there to remain until the assizes come. And then the justice must certify his accusation and examination, and return the recognizance taken for appearance and prosecution of the witnesses; so as the judges at the assizes may, when they come, readily proceed with him as the law prescribeth.

The judges of circuits as they be now, are come into the place of the ancient justices in eyre, called *justiciarii itinerantes*, by which the prime Kings after the Conquest, until Hen. III.'s time especially, and after that, in lesser measure, even to Rich. II., did execute the justice of the realm.

They began in this sort:

The King, not able to dispatch matters in his own person, erected the Court of King's Bench: that not able to do all, nor meet to draw the people all to one

place, there were ordained counties and then sheriff's turns, hundred courts, and particular leet, and law-days, as is before mentioned; which dealt only with crown matters for the public, but not with private titles of lands or goods, nor the trial of grand offences of treasons and felonies. But all the counties of the realm were divided into six circuits, and two learned men well read in the laws and customs of the realm were assigned by the King's commission to every circuit, to ride twice a year through those shires allotted that circuit, making proclamation beforehand a convenient time, in every county, of the time of their coming and place of their sitting, to the end the people might attend them in every county of the circuit. They were to stay three or four days in every shire, and in that time all the causes of the county were brought before them by the parties grieved, and all the prisoners in the gaols in every shire, and whatsoever controversies arisen concerning life, liberty, lands, or goods.

The authority of these justices in eyre is [in part] [1] transferred by act of parliament to justices of assize, which be now the judges of circuits; and they do use the same course that justices in eyre did, to proclaim their coming every half year, and the place of their sitting.

The business of the justices in eyre, and of the justices of assize at this day, is much lessened; for that, in Hen. III.'s time, there was erected the Court of Common Pleas at Westminster; in which court have been ever since, and yet are, begun and handled the great suits of lands, debts, covenants, bene-

But the statute of *Mag. Char. cap.* 11. is negative against it: *viz. Communia placita non sequantur curiam nostram, sed teneantur in aliquo loco certo;* which

[1] Omitted, Sloane MS.

*locus certus* must be the Common Pleas.[1]

fices, and contracts, and fines and recoveries for assurance of lands, which were wont to be either in the King's Bench, or else before the justices in eyre. Yet the judges of circuits now have five commissions by which they sit.

One is a commission of oyer and terminer, directed unto them and many others of the best account in the circuits, selected out of all the counties of their precincts; but in this commission the judges are of the *quorum*, so as without them there can be no proceeding. This commission giveth them power to deal with treasons, murders, and all manner of felonies, offences, and misdemeanors whatsoever; and this is the largest commission of all they have.

One other is a commission of gaol delivery, that is only to the judges themselves, [and the clerk of the assizes associated to them]:[2] and by this commission they are to deal with every prisoner in the gaol, for what offence soever he be there, to proceed with him according to the laws of the realm and the quality of his offence. And they cannot by this commission do any thing concerning any man but those that are prisoners in the gaol.

The course now in use of execution of this commission of gaol delivery is this. There is no prisoner but is committed by some justice of peace, who, before his committing, took his examination, and bound his accusers and witnesses to appear and prosecute at the gaol delivery. This justice doth certify these examinations and bonds; and thereupon the accuser is called solemn-

[1] This, which in the MSS. and editions stands as part of the text, before the sentence "yet the judges, &c.," is obviously a note correcting it.

[2] Omitted in Sloane MS.

ly in the court, and when he appeareth he is willed to prepare a bill of indictment against the prisoner, and go with it to the grand jury, and give evidence upon their oaths, he and the witnesses: which he doth; and the grand jury do thereupon write either *billa vera*, and then the prisoner standeth indicted, or else *ignoramus*, and then he is not touched. The grand jury deliver these bills to the judges in open court; and so many as they find indorsed *billa vera*, they send for those prisoners, and they read every man's indictment unto him, asking him whether he be guilty or not: if he say he is, then his confession is recorded down; if he say Not guilty, then he is asked how he will be tried; he answereth, By the country; and then the sheriff is commanded to return the names of twelve freeholders to the court, which freeholders be sworn to make true delivery between the King and the prisoner; and then the indictment is again read, and the witnesses sworn and do speak their knowledge concerning the fact, and the prisoner is heard at large what defence he can make, and then the jury go together and consult; and after a while they come in again with a verdict of Guilty or Not guilty, which verdict the judges do record accordingly. If any prisoner plead that he is Not guilty upon the indictment, and yet will not put himself to trial by the jury, he is to be pressed to death.

These judges, where many prisoners are in the gaol, do in the end, before they go, peruse every one. Those that were indicted by the grand jury and found not guilty by the petty jury, they judge to be acquitted, and so deliver them out of the gaol. Those that are found guilty by both juries they judge to death, and command the sheriff to see execution done. Those

that refuse trial by the country, they judge to be pressed to death. Some, whose offences are pilfering under twelvepence value, they judge to be whipped. Those that confess their indictments, they judge to death, whipping, or otherwise, as their offence requireth. And those that are not indicted at all, but the bill of indictment returned with *ignoramus* by the grand jury, and all other in the gaol against whom no bills at all are preferred, they do acquit by proclamation: that is, they first make proclamation, that if any man can say any thing against them they shall be heard; but, no man coming in, then the judges are to declare all these acquitted by proclamation out of the gaol. So that one way or another they rid the gaol of all the prisoners in it.

But because some prisoners that can read have their books, and be burned in the hand and so delivered, it is necessary to show the reason thereof. This having their books is called their clergy, which in ancient time began thus.

For the scarcity of men that could read, and the multitude requisite in the clergy of the realm to be disposed into religious houses, priests, deacons, and clerks of parishes, there was a prerogative allowed to the clergy that if any man that could read as a clerk were to be condemned to death, the bishop of the diocese might, if he would, claim him as a clerk; and he was then to see him tried in the face of the court, whether he could read or not. The book was prepared and brought by the bishop, and the judge was to turn to some place as he should think meet; and if the prisoner could read, then the bishop was to have him delivered unto him to dispose in some place of the clergy,

as he should think meet: but if either the bishop would not demand him, or that the prisoner could not read, then was he to be put to death.

And this clergy was allowable in the ancient times and law, for all offences except treason, and robbing churches of their goods and ornaments. But by many statutes made since the clergy is taken away for murder, burglary, robbery, purse-cutting, horse-stealing, and divers other felonies particularized by the statutes to the judges; and lastly, by a statute made 18 Eliz., the judges themselves are appointed to allow the clergy to such as can read, being no offenders from whom clergy is taken away by any statute, and to see them burned in the hand, and so discharge them without delivering them to the bishop; howbeit the bishop appointeth the deputy to attend the judges with a book to try whether they can read or not.

The third commission that judges of circuits have, is a commission, directed to themselves only [and the clerk of assize][1] to take assizes; by which they are called justices of assize. And the office of those justices is to do right upon writs called assizes, brought before them by such as are wrongfully thrust out of their lands: of which the number was much greater in ancient times than now; the rather for that men's seisins and possessions are sooner recovered by sealing leases upon the ground and bringing an *ejectione firmæ*, than by the long suit of assize.

The fourth commission is a commission to take *Nisi Prius*, directed to none but to the judges themselves and their clerks of assizes; by which they are called justices of *Nisi Prius*. These *Nisi Prius* happen in

[1] Omitted in Sloane MS.

this sort; when a suit is begun for any matter in one of the three courts of King's Bench, Common Pleas, or Exchequer, here above, and the parties in their pleadings do vary upon a point of fact; as for example, if in an action of debt upon obligation the defendant denies the obligation to be his deed; or in any action of trespass grown for taking away goods the defendant denieth that he took them; or in an action of the case for slanderous words, the defendant denieth that he spake them, &c.; then the plaintiff is to maintain and prove that the obligation is the defendant's deed, or that he took the plaintiff's goods, or spake those slanderous words: upon which denial and affirmation the law saith that issue is joined between them; which issue of the fact is to be tried by a jury of twelve men of the county where it is supposed by the plaintiff to be done, and for that purpose the judges of the court do award in the King's name a writ to the sheriff of that county called a *venire facias*, commanding him to cause to come before them four and twenty freeholders of his county, at a certain day, to try this issue so joined; out of which four and twenty only twelve are chosen to serve: and that double number is returned, because some may make default, and some be spared upon challenge of kindred, alliance, or partial dealing. These four and twenty the sheriff doth name and certify to the court, and withal that he hath warned them to come at the day appointed according to the writ. But because at this first summons there falleth no punishment upon these four and twenty if they come not, they seldom or never appear upon the writ; and upon their default there is another writ to the sheriff, commanding him to distrain them by their

lands to appear at a certain day appointed by the writ, (which is the next term after, *Nisi prius justiciarii nostri ad assizas capiendas in comitatu venerint*, &c. of which words the writ is called a *Nisi Prius*. And the judges of the circuit which in truth do ride the circuit in that county in that vacation and mean time, before the day of appearance appointed for the jury above, have, by their commission of *Nisi Prius*, authority to take the appearance of the jury in the county before them, and there to hear the witnesses and proofs on both sides concerning the issue of fact, and to take the verdict of the jury, and, against the day they should have appeared above, to return the verdict ready in the court, which return is called a *postea*. And upon this verdict, clearing the fact one way or other, the judges above give judgment for that party for whom the verdict is found, and for such damages and costs as the jury do assess.

By the trials called *Nisi Prius* the juries and parties are eased of much charge which they should be put to by coming to London with their evidences and witnesses, and the courts at Westminster are eased of great trouble that they should have, if all juries for trials should appear and try the causes in those courts: for the courts above have little ease or leisure now, although the juries come not up. Yet in matters of great weight, or where the title is intricate or difficult, the judges above upon information to them do retain those causes to be tried here and the juries do at this day in such cases come to the bar at Westminster.

The fifth commission that the justices in the circuits do sit by is the commission of the peace in every county of their circuit.

And all justices of the peace, having no lawful impediment, are bound to be present at the assizes to attend the judges as occasion shall fall out: and if any make default, the judges may set a fine upon them at their pleasure and discretions. Also the sheriff in every shire through the circuit is to attend in person, or by sufficient deputy allowed by the judges, all the time that they be within the county; and the judges may fine him if he fail; and so they may fine him for negligence or misbehaviour in his office before them: and the judges above may also fine the sheriff for not returning, or not sufficient returning, of writs before them.

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Property in Lands is gotten and transferred: 1, By entry; 2, by descent; 3, by escheat; 4, [and most usually][1] by conveyance.

I. Property by entry is where a man findeth a piece of land that no other possesseth nor hath title unto, and he that so findeth it doth enter upon it; this entry gaineth the property. This law seemeth to be derived from the text *Terram dedit filiis hominum*, which is to be understood, to those that will till and manure, and so make it yield fruit; and that is he that entereth into it, where no man had it before.

But this manner of gaining lands was in the first days, and is not now in use in England; for that by the conquest all lands in this nation were appropriated to the Conqueror, except religious and church-lands, and the lands of Kent, which by composition were left

[1] Omitted in Sloane MS.

to the former owners, as the Conqueror found them; so that no man but the bishops, churches, and men of Kent can at this day make any higher title than from the conquest to any lands in England; and lands possessed without such title are in the crown, and not in him that first entereth. As it is with land left by the sea, that was part of the sea: this land belongeth to the crown, and not to him that hath the land next adjoining, which was the ancient sea-bank.

This is to be understood of the inheritance of lands; *viz.* that the inheritance cannot be gained by first entry. Yet an estate for another man's life may, by our laws, at this day, be gotten by first entry. As if a man called A. having land conveyed unto him for the life of B., dieth without making any estate of it; there, whosoever first and next entereth into the land after the decease of A. getteth property in the land for the time of the continuance of that estate which was granted to A. *viz.* for the life of B. The reason whereof is, because no man can make title of this land: for the first grantor hath let it out to A. for the life of B., which B. yet liveth, and therefore the land cannot revert to him till B. die; and to the heir of A. it cannot go, for it is not any estate of inheritance, but only an estate for another man's life, which is not descendible to the heir, except he be specially named in the grant: *viz.* to him and his heirs: as for the executors of A. they cannot have it; for it is not an estate testamentary, that it should go to executors as goods and chattels. So as in truth no man can entitle himself unto the lands; and therefore the law preferreth him that first entereth, and he is called *occupans*, and shall hold it during the life of B. but must pay the

rent, perform the conditions, and do no waste. And he may by deed assign it to whom he will in his life time; but if he die without assigning then it shall go again to whosoever first entereth and holdeth; and this all the life of B., so often as it shall happen.

[1] Likewise if any man doth wrongfully enter into another man's possession and put the right owner of the freehold and inheritance from it, he thereby getteth the freehold and inheritance by disseisin, and may hold it against all men but him that hath right and his heirs, and is called a disseisor. Or if one die seised of lands, and, before his heir doth enter, one that hath no right doth enter into the lands, and holdeth them from the right heir, he is called an abator, and is lawful owner against all men but the right heir.

And if such person, abator or disseisor, (so as the disseisor hath quiet possession five years next after the disseisin,) do continue their possession, and die seised, and the land descend to his heir, they have gained the right to the possession of the land against him that hath right till he recover it by fit action real at the common law. And if it be not sued for at the common law within threescore years after the disseisin or abatement committed, the right owner hath lost his right by that negligence.

And if a man hath divers children, and the elder, being a bastard, doth enter into the land and enjoyeth it quietly during his life, and dieth thereof so seised, his heirs shall hold the land against all the lawful children and their issues.

II. Descent of lands is where a man that hath land

[1] The rest of this title is omitted in Sloane MS.

of inheritance dieth, not making any disposition of it, but leaveth it to go as the law appointeth: the law casteth it upon the heir. This is called a descent of land; but which shall be heir to inherit the land, upon whom the descent is to alight, is the question.

For which purpose the law of inheritance preferreth the child first before all others, and amongst children the male before the female, and amongst males the first born: if there be no children, then brothers: if no brothers, then sisters: if neither brothers nor sisters, then uncles, and for lack of uncles, aunts: if none of them, then cousins in the nearest degree of consanguinity: — with these three rules of diversities. Firstly, that the eldest male shall solely inherit; but if it come to females, then the females, being all equal in degree of nearness, shall inherit all together, and they are called parceners, and all they make but one heir. Secondly, that no brother or sister of the half-blood shall inherit to his brother or sister; but a child shall to his parents. As for example, if a man have two wives, and by either wife a son; the eldest son overliving the father is to be preferred to the inheritance being fee-simple; and if he enter and die without a child, the brother shall not be his heir, because he is of the half-blood to him, but the uncle of the eldest son or sister of the whole blood: but if the eldest brother had died in the life of the father, or had not entered after his father's death, then the youngest son should as heir to his father inherit the land his father had (although he were a child of the second wife), before any daughter of the first. Thirdly, that land purchased, either by such entry or conveyance, by the party himself that dieth is to be inherited, first, by

the heirs of his father's side, and if he have none of that part, then by the heirs of his mother's side; but lands descended to him from his father or mother are to go to that side only from which they came, and never to the other side.

These rules [of descent] before mentioned are to be understood of fee-simples, and [not of][1] entailed lands. And these rules are restrained by some particular customs of particular places: as namely, by a custom of Kent, that every male of equal degree of childhood, brotherhood, or kindred, shall inherit equally (as daughters shall, called parceners); and in many boroughs of England the custom alloweth the youngest son to inherit, and so the youngest brother. The custom of Kent is called gavelkind: the other in boroughs, is called Borough-English.

And there is another note to be observed in fee-simple inheritance, and that is, that every heir having any fee-simple land or inheritance, by common law or custom of either gavelkind or Borough-English, is chargeable so far as the value thereof extendeth, with the binding acts of the ancestors from whom the inheritance descended. And these acts are called encumbrances; and the reason of this charge is, *Qui sentit commodum, sentire debet et incommodum sive onus.*

As for example, if a man do bind himself and his heirs in an obligation, or do covenant by writing for him and his heirs, or do grant an annuity for him and his heirs, or do make a warranty of land, binding him and his heirs to warrant: in all these cases the heir is

[1] Harl. MS. omits the words in brackets in both places. In truth, neither reading of the passage gives a very good meaning. The rules require modification when applied to entails, but can hardly be said to be totally inapplicable.

chargeable after the death of his ancestor with this obligation, covenant, annuity, and warranty; yet with these three cautions. First, that the party must by special name bind him and his heirs, or covenant, grant, or warrant for him and his heirs; otherwise the heir is not to be touched. Secondly, that some action must be brought against the heir whilst the land or other inheritance resteth in him unaliened away: for if the ancestor die, and the heir, before any action brought against him upon those bonds, covenants, or warranties, do alien away the land, then the heir is clean discharged of the burden; except the land were by fraud conveyed away of purpose to prevent the suit intended to be brought against him. Thirdly, that no heir is to be charged farther than the value of the land descended unto him from the same ancestor that made the instrument of charge; and that land also not to be sold outright, but to be kept in extent, at a yearly value, until the debt or damage be run out. Yet nevertheless if an heir that is sued upon such a debt of his ancestor do not deal clearly with the court when he is sued; that is, if he do not come in, and set down by way of confession the true quantity of his inheritance descended, and submit himself therefore as the law requireth, then that heir that otherwise demeaneth himself shall be charged of his own lands and goods, and of his money, for the deed of his ancestor. As for example; if a man bind himself and his heirs in an obligation of one hundred pounds, and dieth, leaving but ten acres of land to his heir; if his heir be sued upon the bond, and he cometh in, and denieth that he hath any lands by descent, and it is found against him by the verdict that he hath ten acres, this heir shall

now be charged by his false plea of his own lands, goods, and body, to pay the hundred pounds, although the ten acres be not worth ten pounds.

III. Property by escheat is where the owner of the land dieth in possession without child or other heir; there the land, for lack of heir, is said to escheat to the lord of whom it is holden.

This lack of heir happeneth principally in two cases: the one where the land owner is a bastard; the other where he is attainted of felony or treason. For neither can a bastard have an heir, except it be his own child, nor a man attainted have any heir although it be his own child.

Upon attainder of treason the King is to have the land, although he be not the lord of whom it is holden, because it is a royal escheat. But for felony it is not so; for there the King is not to have the escheat except the land be holden of him: and yet, where the land is not holden of him, the King is to have the land for a year and a day next ensuing the judgment of attainder, with a liberty all that year to commit all manner of waste in houses, gardens, ponds, lands, and woods.

In these escheats two things are especially to be observed; the first is the tenure of the lands, because that directeth the person to whom the escheat belongeth, *viz.* the lord of whom the land is holden; the other is the manner of such attainder as draweth with it the escheat.

Concerning the tenure of lands, it is to be understood that all lands are holden of the crown, either mediately or immediately, and that the escheat apper-

taineth to the immediate lord, and not to the mediate. The reason why all land is holden of the crown, immediately or by mesne, is this:

The Conqueror got, by right of conquest, all the land of the realm into his own hands, in demesne, taking from every man all estate, tenure, property, and liberty of or in the same, except religious and church lands, and the lands of Kent: and still as he gave any of it out of his own hand, he did reserve some retribution of rents, or services, or both, to him and his heirs, which reservation is that which is called the tenure of the land.

In which reservation of tenure he had four institutions, exceeding politic, and suitable to the state of a conqueror.

First, seeing his people to be part Normans, brought by him, and part Saxons, found here, he bent himself to conjoin them in amity by marriages; and for that purpose ordained, that if those of his nobles, knights, and gentlemen, to whom he gave great rewards of lands, should die, leaving their heir within age, a male within twenty-one, a female within fourteen years, and unmarried, then the King should have the bestowing of such heirs in marriage, in such family and to such persons as he should think meet; which interest of marriage went still implied, and doth so at this day, in every tenure of land called knight-service.

The second was, to the end his people should still be conserved in warlike exercises and able for his defence, when he gave any good portion of land that might make the party of ability and strength he withal reserved this service, that the party and his heirs having this land should keep a horse of service continually,

and serve himself upon him when the king went into war; or else, having impediment to excuse his own person, should find another to serve in his place; which service of horse and man is a part of the tenure called knight-service at this day. And the tenant himself being an infant, the King is to hold the land himself until his full age, finding him meat, drink, apparel, and other necessaries, and to find a man and horse with the overplus, to serve in the wars as the tenant himself should do if he were of full age. But if this inheritance descend upon a woman that cannot serve by her sex, yet the King is not to have the lands, she being of fourteen years of age, because she is then able to have a husband that may do the service in person.

The third institution was, that upon every gift of land he reserved as part of the tenure a vow and an oath to bind the party to his faith and loyalty: the vow was called homage, the oath fealty. Homage is to be done kneeling, holding his hands between the King's, saying, in the French tongue, "I become your man of life and limb, and of earthly honour." Fealty is to take an oath upon a book that he will be a faithful tenant to him, and do his service, and pay his rents according to his tenure.

The fourth institution was, that for recognition of the King's bounty by every heir succeeding his ancestor in these knight-service lands, the King should have *primer seisin* of the land, which is one year's value of the land; and until this be paid the King is to be in possession of the land, and then to deliver it to the heir; which continueth in use until this day, and is the very cause and business of suing livery, and is as well where the heir hath been in ward as otherwise.

These beforementioned be the rights of the tenure called knight-service *in capite*, which is as much as to say tenure *de persona regis*, and *caput* being the chiefest part of the person, it is called a tenure *in capite*, or in chief.

And it is also to be noted, that as this tenure *in capite* by knight-service generally was a great safety to the crown, so also the Conqueror instituted other tenures *in capite* necessary for his state. As namely, he gave divers lands to be holden of him by some special service about his person, or by bearing some special office in his house, or in the field, which have knight-service and more included in them; and these be called tenures by grand serjeanty. Also he provided, upon the gift of lands, to have a reservation of continual service of ploughing his land, repairing his houses, park-pales, castles, and the like; and sometimes to have a yearly provision of gloves, spurs, hawks, horses, hounds, and the like; which kind of reservations be called also tenures in chief, or *in capite*, of the King; but they are not by knight-service; because they require no personal service, but only such things to be done as the tenant may hire another to do, or provide for his money. And this tenure is called a tenure *in capite* by socage, the word *soca* signifying the plough. Howbeit, in this latter time the service of ploughing the land is turned into money rent, and so of harvest works; for that the Kings do not keep their demesne in their hands as they were wont to do: yet what lands were *de antiquo dominico coronæ* well appeareth in the records of the Exchequer, called the Book of Doomsday. And the tenants be now called tenants in ancient demesne, and have many immunities and privileges at this day that

in ancient times were granted to those tenants by the crown; the particulars whereof are too long to set down.

[1] These tenures *in capite*, as well that by socage as the others by knight-service, have this property; that the tenants cannot alien their lands without license of the King; if they do, the King is to have a fine for the contempt, and may seize the land and retain it until the fine be paid. And the reason of this seemeth to be, for that the King would have a liberty in the choice of his tenant; so that no man should presume to enter into those lands and hold them, for which the King was to have those special services done him, without the King's leave.

This license and fine as it is now digested is easy and of course. There is an office called the Office of Alienations; where any man may have a license at a reasonable rate, that is, at the third part of one year's value of the land; and if there be an alienation without license, then in this office the party may compound for his fine at one's year's value of the land, moderately rated.

A tenant *in capite* by knight-service or grand serjeanty was restrained by an ancient statute, that he should not give nor alien away more of his lands than that with the rest he might be able to do the service due to the King; but this is now out of use.

And to this tenure by knight-service in chief was incident, that the King should have a sum of money, called aid, to be ratably levied amongst all those tenants

[1] This paragraph is omitted by Harl. MS. It does not stand well with some of the succeeding paragraphs, and we probably have a mixture of two different recensions.

proportionably to their lands, to make his eldest son a knight, or to marry his eldest daughter.

And it is to be noted, that all those that hold lands by the tenure of socage *in capite*, although not by knight-service, cannot alien without license; and they are to sue livery, and pay *primer seisin*, but not to be in ward for body or land.

By example and resemblance of the King's policy in these institutions of tenures, the great men and gentlemen of the realm did the like as near as they could; as for example, when the King had given to any of them two thousand acres of land, this party, purposing in this place to make his dwelling, or, as the old word is, his mansion or his manor house, (of *maneo* and thence *manerium*,) did devise how he might make his land a competent habitation to supply him with all manner of necessaries; and for that purpose, first, he would give of the uttermost parts of these two thousand acres, one hundred or two hundred acres, more or less as he should think meet, to some of his own trusty servants, (with some reservation of rent,) to find a horse for war, and go with him when he went with the King to the wars, adding the vow of homage, the oath of fealty, wardship, marriage, and relief. This relief is to pay five pounds for every knight's fee, or after that rate for more or less, at the entrance of every heir. Which tenant so created and placed was, and is to this day, called a tenant by knight-service, not of his own person, but of his manors. Of these he might make as many as he would.

Then this lord would provide that the land which he was to keep for his own use should be ploughed, and his harvest brought home, his house repaired, or his

park paled, or the like: and for that end he would give some less parcels to sundry others, of twenty, thirty, forty, or fifty acres; reserving the service of ploughing, either a certain quantity, or so many days, of his land, and certain harvest works or days in harvest to labour, or to repair the house, park-pale; or otherwise to give him, for his provision, capons, hens, pepper, cummin, roses, gilliflowers, spurs, gloves, or the like; or to pay him a certain rent; and to be sworn to be his faithful tenant; which tenure was called a socage tenure, and is so to this day; howbeit most of the ploughing and harvest services are turned into money rents. These tenants, at the death of every tenant, were to pay a relief, which was not, as knight-service is, five pounds a knight's fee; but it was, and so is still, one year's rent of the land; and no wardship or other profit to the lord.

The remainder of the two thousand acres, which he kept to himself, he used to manure by his bondmen, and appointed them at the courts of his manor how they should hold it, making an entry of it into the roll of the remembrances of the acts of his court; yet still in the lord's power to take it away: and therefore they were called tenants at will, by copy of court roll; being in truth bondmen at the beginning; but having attained freedom of their persons, and gained a custom by use in occupying their lands, they are now called copyholders, and are so privileged by this custom as that the lord cannot put them out. Some copyholders are for the life of one, two, or three successively; some inheritances from heir to heir by custom; and custom ruleth these estates wholly, both for widows' estates, fines, heriots, forfeitures, and all other things.

Manors being in this sort at the first made, it grew out of reason that the lord of the manor should hold a court; which is no more than to assemble his tenants at times by him to be appointed; in which court he has to be informed, by oath of his tenants, of all such duties of rents, reliefs, wardships, copyholds, or the like, that had happened unto him; which information is called a presentment; and then his bailiff was to seize and distrain for those duties, if they were denied or withholden. This court is called a court baron: and herein a man may sue for any debt or trespass under forty shillings value, and the freeholders are to judge of the cause upon the proofs produced on both sides. And therefore the freeholders of these manors, as incident to their tenure, do hold by suit of court; which is, to come to the court, and there to judge between party and party in these petty actions, and also to inform the lord of duties of rents, and services unpaid to him from his tenants.

By this discourse it is discerned who be the lords of lands such as, if the tenants die without heir or be attainted of felony, shall have the land by escheat.

Now, concerning what attainders shall give the escheat to the lord, it is to be noted, that it must be either by judgment of death, pronounced in some court of record against the felon found guilty, by verdict or confession, of the felony; or it must be by outlawry of him.

This outlawry groweth in this sort: a man is indicted for felony, being not in hold, so as he cannot be brought in person to his trial; so as therefore process of *capias* is awarded to the sheriff to take him; who finding him not, returneth *non est inventus in balliva*

*mea;* and thereupon another *capias* is awarded to the sheriff, who likewise, not finding him, maketh the like return; then a writ which is called an *exigent* is directed to the sheriff, commanding him to proclaim him in his county court five several court days, to yield his body; which if the sheriff do, and the party yield not his body, then he is, by that default, said to be outlawed; the coroners adjudging him there outlawed, and the sheriff making return of the proclamations and of the judgment of the coroners upon the back side of the writ. This is an attainder of felony, whereupon the offender doth forfeit his lands, by an escheat, to the lord of whom they be holden.

But note, that a man found guilty by verdict or confession, and praying his clergy, and thereupon reading as a clerk, and so burnt in the hand and discharged, is not attainted; because he by his clergy preventeth judgment of death, and is called a clerk convict, who loseth no lands, but all his goods, chattels, leases, and debts.

So a man indicted that will not answer, nor put himself upon trial, although he by this have judgment to be pressed to death, yet he doth forfeit no lands, but goods, chattels, leases, and debts; except his offence be treason, and then he forfeiteth his lands to the crown.

So a man that killeth himself loseth no lands, but his goods, chattels, leases, and debts. So of those that kill others in their own defence, or by misfortune.

A man that, being pursued for felony, flyeth for it, loseth his goods for his flying, although he return and be tried, and found not guilty of the fact.

So a man indicted of felony, if he yield not his body to the sheriff until after the exigent for proclamation be awarded against him, this man doth forfeit his goods

for his long tarryance, although he be found not guilty of the felony. But none is attainted to lose his lands, but such as have judgment of death upon trial, by verdict or their own confession, or else that they be by judgment of the coroners outlawed as before.

Besides these escheats of lands to the lords of whom they be holden for lack of heirs, and by attainder for felony, which only do hold place in fee-simple lands, there are also forfeiture of lands by attainder to the crown. As namely, if one that hath entailed lands commit treason, he forfeiteth his lands to the crown, by a statute made 26 H. VIII. But if he commit felony he forfeiteth only the profits of his lands for his life to the crown, but not to the lord.

And if a man, having an estate for life only of himself or of another, commit treason or felony, the whole estate is forfeited to the crown; but no escheat to the lord.

But all copyhold of fee-simple or for life is forfeited to the lord and not to the crown; and if it be entailed, the lord is to have it during the life of the offender only, and then his heir is to have it.

The custom of Kent is, that gavelkind land is not forfeited nor escheated for felony; for they have an old saying, "the father to the bough, and the son to the plough."

If the husband was attainted, the wife was to lose her thirds in cases of felony and treason both; yet she is no offender. But, at this day, it is holpen by statute law that she loseth them not for her husband's felony.

The relation of these forfeitures are these: First, that men attainted of felony or treason by verdict or confession do forfeit all the lands they had at the time of

the offence committed; and the King or lord, whichsoever of them hath the escheat or forfeiture, shall come in and avoid all leases, statutes, conveyances, or incumbrances done by the offender at any time since the offence done. And so is the law also clear, if a man be attainted for treason by outlawry. But upon attainder of felony by outlawry, it hath been much questioned in law books whether the lord's title by escheat shall reach back to the time of the offence done, or only of the date or test of the writ of exigent for proclamation whereupon he is outlawed: howbeit, at this day it is ruled that it shall reach back to the time of his fact. But for goods, chattels, and debts, the King's title shall look no further back than to such goods as the party attainted by verdict or confession had at the time of the verdict or confession given or made, and in outlawries at the time of the date of the exigent, as well in treasons as felonies. Wherein it is also to be observed that, upon the party's first apprehension, the King's officers may seize all his goods and chattels and preserve them together, dispending only so much out of them as is fit for sustentation of the party in prison, without wasting or disposing them, until conviction: and then the property of them is in the crown, and not before.

It is also to be noted, that persons attainted of felony or treason have no capacity to take, obtain, or purchase, save only to the use of the King, until they be pardoned. And the pardon giveth not back the lands or goods forfeited without a special patent of restitution; and such patent of restitution cannot restore the blood without an act of parliament. So that if a man have a son, and then is attainted of felony or treason and pardoned, and purchaseth lands, and then hath an-

other son, and dieth; the son he had before his pardon, although he be his eldest son and the patent have words of restitution of his lands, shall not inherit this land, but his second son shall: and for the land he had before his pardon and is restored, also the second son shall inherit it, and not the first; because the blood betwixt him and the first is corrupted by the attainder and cannot be restored by patent alone, without act of parliament. And if a man have two sons, and the eldest is attainted in the life of his father and dieth without issue, the father living, the second son shall inherit the father's lands; but if the eldest son leave any issue, though he die in the life of his father, then neither the second son, nor the issue of the eldest, shall inherit the father's lands, but the father there shall be accounted to die without heir, and the land shall escheat; and if the eldest son outlive the father, then the land shall escheat whether the eldest son have issue or not, afterward or before, though he be pardoned after the death of his father.

IV. Properties of lands by conveyance are distributed into divers estates, viz. for years, for life, in tail, and fee-simple.

These estates are created by word, by writing, or by record.

1. For estates of years, which are commonly called leases for years, they are thus made where the owner of the land agreeth with another by word of mouth, that this other shall hold and enjoy the land, or take the profits of it, for a time certain of years, months, or days, agreed between them; and this is called a lease parol. Such a lease may also be made by writing

poll, or by writing indented by words of *demise*, *grant*, *and to farm let;* and so also by fine of record; but whether any rent be reserved or no, it is not material. Unto these leases there may be annexed such exceptions, conditions, and covenants, as the parties can agree on. They are called chattels real, and are not inheritable by the heirs, but go to the executors or administrators; they be saleable for debts in the life of the owner, or in the executors' or administrators' hands, by writs of execution upon statutes, recognizances, and judgments of debts or damages. They be forfeitable to the crown by outlawry, by attainder of treason, felony, or premunire, by killing himself, flying for felony although not guilty of the fact, standing mute or refusing to be tried by the country, by conviction of felony by verdict without judgment, petty larceny, or going beyond the sea without license.

Of like nature as leases for years are interests gotten in other men's lands, by extending for debt upon judgment in any court of record, statute merchant, statute staple, or recognizances, (which being upon statutes are called tenants by statute merchant, or staple;—the other tenants by *elegit*,) and by wardship of body and lands: for all these are also called chattels real, and do go to executors and administrators and not to the heirs, and are saleable and forfeitable as leases for years are.

2. Leases for lives are called freeholds. They may also be made by word, writing, or record: if by word or writing there must be livery and seisin given at the making of the lease; which livery and seisin is done in this manner: the maker of the lease which we call the lessor, cometh to the door, back side, or garden, if it be

a house, — if not, then to some part of the land, — and there expresseth, that he doth grant it to the taker, called the lessee, for term of his life, and, in seisin thereof, he delivereth to him a turf, or twig, or ring of the door: and if the lease be by writing, then commonly there is a note written on the back side of the lease with the witnesses' names. This estate for life is not saleable by the sheriff for debt, but the land is to be extended at a yearly value to satisfy the debt. It is not forfeitable for outlawry, except in felony, nor by any of the means before mentioned of leases for years, saving attainders for felony, treason, or premunire; and then only to the crown, not to the lord by escheat.

And though a nobleman or other have liberty by charter to have all felons' goods; yet a tenant holding for term of life, being attainted of felony, doth forfeit to the King, and not to this nobleman.

If a man have an estate in lands for another man's life, and dieth; this land cannot go to his heir, nor to his executors, but to the party that first entereth; and he is called an occupant, as before in the former part of this discourse is declared.

A lease for years or for life, may also be made by fine of record, or bargain and sale, or covenant to stand seised upon good consideration of marriage or blood: the reasons whereof are hereafter expressed.

3. Entails of lands are created by a gift, with livery and seisin, to a man and the heirs of his body. The word "body" (making the entail) may be demonstrated or restrained to males or females, heirs of their two bodies, heirs of the body of his father or grandfather.

Entails began by a statute made in Edw. I.'s time;

by which also they are so much strengthened, as the tenant in tail could not put away the land from the heir by any act of conveyance or attainder, nor let it nor encumber it longer than his own life.

But the inconvenience thereof was great; for by that means, the land being so sure tied upon the heir as his father could not put it from him, it made the son to be disobedient, negligent, and wasteful, often marrying without the father's consent, and to grow insolent in vice knowing that there could be no check of disinherison over him. It also made the owners of land less fearful themselves to commit murders, felonies, treasons, and manslaughters; for that they knew none of these acts could hurt the heir in his inheritance. It hindered men that had entailed lands, that they could not make the best of their lands by fine and improvement; for that none, upon so uncertain an estate as for term of his own life, would give him a fine of any value, nor lay any great stock upon the land that might yield rent improved: and lastly, these entails did defraud the crown and many subjects of their debts; for that the land was not liable longer than his own life time; which made that the King could not safely commit any office of account to such whose lands were entailed, nor other men trust them with loans of money.

These inconveniences were all remedied by acts of parliament later than the act of entails; as namely, by statutes made 4 H. VII. and 32 H. VIII., a tenant in tail may disinherit his son by a fine with proclamation, and may by that means also make it subject to his debts and sales; by a statute made 26 H. VIII. a tenant in tail doth forfeit his lands for treason; and by

another statute, 32 H. VIII. he may make leases good against his heir for one and twenty years, or three lives, so it be not of his chief houses, lands, or demesne, nor a lease in reversion, nor less rent reserved than the tenants have paid most part of one and twenty years before, nor having any manner of discharge for doing wastes or spoils; and by a statute made 33 H. VIII. tenants of entailed lands are liable by extent for the King's debts; and by statutes made 13 and 39 Eliz. they are saleable for the arrearages upon his account for his office. So that it resteth only that entailed lands have now these two privileges: not to be forfeited for felonies, nor to be extended for debts after the party's death, except the entail be cut off by fine and recovery.

But it is to be noted, that since these notable remedies provided by the statute to dock entails, there is started up a device called perpetuity; which is an entail with an addition of a proviso conditional, tied to his estate, not to put away the land from the next heir; and if he do, to forfeit his own estate. Which perpetuities, if they should stand, would bring in all the former inconveniences of entails, that were cut off by the former mentioned statutes; and far greater: for, by the perpetuity, if he that is in possession start away never so little, in making a lease, or selling a little quillet, forgetting after two or three descents, as often they do, how they are tied; the next heir must enter, who peradventure is his son, his brother, uncle, or kinsman: and this raiseth an unkind suit, setting all the kindred at jars, some taking part with one side, some with the other, and the principals wasting their time and money in suits of law: so that in the end

they are both constrained by necessity to join together to sell the land or a good part of it, to pay the debts occasioned through their suit. And if the chief of the family, for any good purpose of well seating himself, by selling that which lieth far off to buy nearer, or for the advancement of his daughters or younger sons, should have just and reasonable cause to sell; there this perpetuity, if it should hold good, restraineth him. And more than that, where men that are owners of the inheritance of land not entailed may, during the minority of the eldest son, appoint the profits to go to the advancement of the younger sons and daughters, and to pay debts; by entails and perpetuities the owners of these lands cannot do it, but they must suffer the whole to descend to the eldest son, and so to come to the crown by wardship all the time of his infancy. And where men, foreseeing dangerous times or untowardly heirs, might prevent the mischief of undoing their houses by conveying their lands out of them, or from such heirs, they are by the perpetuity tied; so as they stand tied to the stake for forfeiture to the crown, and restrained from disposing it to their own, or to their children's, good. Therefore it is worthy of good consideration, whether it be better for the subject and sovereign to have lands secured to men's names and blood by perpetuities, with all the inconveniences abovementioned, or to be free, with hazard of undoing his house by unthrifty posterity.

4. The last and greatest estate of land is fee-simple, and beyond this there is none. All the former, for years, lives, or entails, have further beyond them the estate of fee-simple; but fee-simple itself is the greatest, last, and uttermost degree of estates in land. There-

fore he that maketh a lease for life to one, or a gift in tail, may appoint a remainder to another for life or in tail after that estate, or to a third in fee-simple; but after a fee-simple he can limit no other estate. And if a man do not dispose of the fee-simple by way of remainder when he maketh the gift in tail, or for lives, then the fee-simple resteth in himself as a reversion.

And the difference between a reversion and a remainder is this: the remainder is always a succeeding estate, appointed upon the gift of a precedent estate at the time when the precedent is appointed; but the reversion is the estate left in the giver, after a particular estate made by him for years, life, or in tail. Where the remainder is [not][1] made with the particular estates, then it must be done by deed in writing, with livery and seisin, and cannot be by words. And if the giver will dispose of the reversion afterwards, that remaineth in himself, he is to do it in writing and not by word, and the tenant is to have notice of it, and to atturn it, which is to give his assent by word, or paying rent, or the like; and except the tenant will thus atturn, the party to whom the reversion is granted cannot have the reversion; neither can he compel him by any law to atturn, unless the grant of the reversion be by fine; and then he may, by writ provided for that purpose: and if he do not purchase that writ, yet by the fine the reversion shall pass, but the tenant shall pay no rent except he will, nor be punished for any waste in houses, woods, &c. [unless it be granted by bargain and sale by indenture enrolled[2]].

[1] I have introduced this negative without authority.

[2] Harl. MS. omits this, which seems a correction not well fitted into the text.

These fee-simple estates lie open to all perils of forfeitures, extents, incumbrances, sales, &c.

Lands are conveyed by these six means: 1. Feoffment; 2. Fine; 3. Recovery; 4. Bargain and sale; 5. Covenant to stand seised; 6. A Will in writing.

1. A feoffment is, where, by deed or[1] without deed, lands are given to one and his heirs, and livery and seisin made. If a lesser estate than fee-simple be given, and livery of seisin made, it is not called a feoffment, but either a lease for life or a gift in tail, as above is mentioned.

2. A fine is a real agreement beginning thus, *Hæc est finalis concordia*, &c., and this is done before the King's judges in the Court of Common Pleas concerning land, that one man shall have it from another to him and his heirs, or to him for his life, or to him and the heirs or heirs male of his body, or for years certain; whereupon rent may be reserved, but no condition or covenants. This fine is a record of great credit; and upon this fine four proclamations are made openly in the Common Pleas; that is, every term one, for four terms together: and if any man, having right to the land, make not his claim within five years after these proclamations ended, he loseth his right for ever: except he be an infant, a woman covert, or beyond the seas, or mad; and then his right is saved, so that he claim it within five years after his full age, the husband's death, return from beyond the seas, or recovery of his wits, as the case falleth out. This fine is called a feoffment of record; because that it includeth all the feoffment doth, and worketh further of its own nature, and barreth entails peremptorily, whether the heir doth

[1] The printed text and Sloane MS. omit this, and add to the sentence "according to the form and effect of the deed."

claim within five years or not, if he claim by him that levied the fine.

3. Recovery is where, for assurance of lands, the parties do agree that one shall begin an action real against the other, as though he had good right to the land; and the other shall not enter into defence against it, but allege that he bought the land of one I. S. who hath warranted it to him, and pray that I. S. may be called in to defend the title: which I. S. is one of the criers of the Common Pleas, and is called the common vouchee. This I. S. shall appear and make as if he would defend it, but shall pray a day to be assigned him by the court to bring in his matter of defence; which being granted him, at the day he maketh default; and thereupon the court is to give judgment against him. Which judgment cannot be for him to lose the land, because he hath it not, but the party that he sold it to hath it, who vouched him to warrant it: therefore the demandant, who hath now no defence made against him, must have judgment to have the land against him that he sued, who is called the tenant, and the tenant is to have judgment against I. S. to recover in value so much land of his, whereas in truth he hath none, nor never will. And by this device, grounded upon strict principles of law, the first tenant loseth the land and hath nothing; but it is by his own agreement, for assurance to him that bought it.

This recovery barreth entails and all remainders and reversions that should take place after the entails: saving where the King is giver of the entail and keepeth the reversion in himself; there neither the heir, nor the remainder, nor reversion is barred by the recovery.

The reason why the heirs in tail, remainders, and

reversions are thus barred is, because in strict law the recompense adjudged against the crier, that was vouched, is to go in succession of estate as the land lost should have done, and then it were not reason to allow the heir liberty to keep the land itself, and also to have recompense; therefore he loseth the land, and is to trust to the recompense.

This sleight was first invented when entails fell out to be so inconvenient as is before declared, so that men made no conscience to cut them off if they could find law for it. And now, by use, these recoveries are become common assurances against entails and against the remainders and reversions, and are the greatest security purchasers have for their money; for a fine will bar the heir in tail, and not the remainder, nor reversion, but a common recovery will bar them all.

Upon feoffments, fines, and recoveries, the estate of the land doth settle as the use and intent of the parties is declared, by word or writing, before the act was done; as for example, if they make a writing that one of them shall levy a fine, or make a feoffment, or suffer a recovery to the other, but the use and intent is, that one should hold it for his life, and after his death, a stranger to have it in tail, and then a third in fee-simple: in this case the land settleth in estate according to the use and intent declared: and that by reason of a statute made 27 H. VIII. conveying the land in possession to every one that hath interest in the use or intent of the fine, feoffment, or recovery, according to the use and intent of the parties.

4. Upon this statute is also grounded the fourth and fifth of the six conveyances, *viz.* bargains and sales, and covenants to stand seised to uses; for this statute,

wheresoever it findeth an use, conjoineth the possession to the use, and turneth the possession into that quality of estate, condition, rent, and the like, as the use hath.

The use is but the equity and honesty to hold the land *in conscientia boni viri.* As for example, if I and you agree that I shall give you money for your land, and you shall make me assurance of it; I pay you the money, but you have made me no assurance: here, although the estate of the land be still in you, yet the equity and honesty to have the land is with me; and this equity is called the use. Upon which I had no remedy, but in Chancery, until this statute, made 27 H. VIII.; and now, this statute conjoining and conveying the land to him that hath the use, I, for my money paid to you, have the land itself, without any other conveyance from you; and this is called a bargain and sale.

But the same parliament that made that statute did foresee that it would be mischievous that men's lands should so suddenly, upon the payment of a little money, be conveyed from them, peradventure in an alehouse or a tavern upon strainable advantages, [and][1] did gravely provide another act, in the same parliament, that the land, upon the payment of this money, should not pass away except there were a writing indented made between the parties, and the said writing also within six months enrolled in some of the courts at Westminster, or in the sessions rolls in the shire where the land lieth; [except it be in cities or corporate towns where they did use to enrol deeds, and there the statute extendeth not.][2]

[1] I have added this without authority.
[2] Omitted in Sloane MS.

5. The fifth conveyance[1] is a conveyance to stand seised to uses. It is in this sort: a man that hath wife and children, brothers or kinsfolks, may by writing under his hand and seal agree that for their or any of their preferment he will stand seised of his land to their uses, either for life, in tail, or fee-simple, as he shall see cause; upon which agreement in writing there ariseth an equity or honesty that the land should go according to this agreement, nature and reason requiring and allowing these provisions; which equity and honesty is the use. And the use being created in this sort, the statute of 27 H. VIII., beforementioned, conveyeth the estate of the land as the use is appointed.

And so this covenant to stand seised to uses is at this day, since the said statute, a conveyance of land. But this differeth from a bargain and sale, in that this needeth no enrolment as a bargain and sale doth, nor is tied to be in writing indented, as bargain and sale must: and if the party to whose use he agreeth to stand seised of the land be not wife, child, or cousin, or one that he meaneth to marry, then will no use rise, and so no conveyance: for although the law alloweth these weighty considerations of marriage and blood to raise uses, yet doth it not so of trifling considerations of acquaintance, schooling, service, and the like. But where a man maketh an estate of his land to others, by fine, feoffment, or recovery, he may then appoint the use to whom he listeth, without respect of kindred, marriage, money, or other things; for in that case, his own will

[1] The MSS. have "The last conveyance of the [or, a] fine;" which, I suppose, indicates a reading "five," and that at first Wills were not treated of under this heading.

and declaration guideth the equity of the estate. It is not so when he maketh no estate, but agreeth to stand seised, or when he taketh anything, as in the cases of bargain and sale and covenant to stand seised to uses.

6. The last of the six conveyances is a will in writing; which course of conveyance was first ordained by a statute made 32 H. VIII. before which statute no man might give land by will, except it lay in some borough town where there was a special custom that men might give their lands by will; as it is in London, and many others.

The not giving land by will was thought to be a defect at common law, that men in wars, or suddenly fallen sick, had not power to dispose their lands, except they could make a feoffment, or levy a fine, or suffer a recovery, which lack of time would not permit; and for men to do it by these means, when they could not undo it again, was hard: besides, even to the last hour of death, men's minds might alter upon further proof of their children or kindred, or increase of children, or debt, or desert of servants or friends.

For which causes it was reason that the law should permit him to reserve to the last instant the disposition of his lands, and yet then also to give him a means to dispose it: which seeing it did not, men used this device:

They conveyed the full estates of their lands, in their good health, to friends in trust, called properly feoffees in trust; and then they would, by their wills, declare how these friends should dispose of the lands; and if those friends would not perform it, the course of the chancery was, to compel them by reason of trust. And this trust was called the use of the land; so as the

feoffees had the land, and the party himself the use; which use was an equity to take the profits himself, and that the feoffees should make such estates as he should appoint them; and if he appointed none, then the use was to go to the heir as the estate itself of the land should have done. For the use was to the estate as a shadow following the body.

By this course of putting lands into use there were many inconveniences, as this use that grew first of a reasonable cause, to give men liberty to dispose their own, was turned to defraud many of their just and conscionable rights: as namely, a man that had cause to sue for his land knew not against whom to bring his action, nor who was owner of it; the wife was of her thirds defrauded; the husband of being tenant by the courtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for his debt; the poor tenant of his lease: for these rights and duties were given by the law from him that was owner of the land and none other, which was now the feoffee in trust; and so the old owner, which we call the feoffor or *cestui que use*, should take the profits and have power to dispose the land at his direction to the feoffee, and yet he was not such a tenant or so seised of the land as his wife could have dower, or the land be extended for his debts, or that he could forfeit it for felony or treason, or that his heir could be ward for it, or any duty of tenure fall to the lord by his death, or that he could make any lease of it.

Which frauds, by degrees of time as they increased, were remedied by divers statutes; as namely, by a statute of 11 H. VI. it was appointed that the action may be brought against him which taketh the profits, which

was this *cestui que use;* by the statute of 1 R. III., leases and estates made by *cestui que use* are made good, and statutes by him acknowledged: by 4 H. VII. the heir of *cestui que use* is to be in ward: by 16 H. VIII. the lord is to have relief upon the death of any *cestui que use.*

Which frauds multiplying nevertheless daily, in the end the parliament of 27 H. VIII., purposing to take away all those uses, and reduce the law to the ancient form of conveying land by public livery and seisin, fine, and recovery, did ordain that where lands were put in trust or use, there the possession and estate should be presently carried out of the friends in trust, and settled and vested in him that had the use, for such term and time as he had the use.

By this statute of 27 H. VIII. the power of disposing land by will was clean taken away amongst those frauds; and so the statute did, *disperdere justum cum impio:* whereupon, 32 H. VIII., another statute was made, to give men power to give lands by will in this sort: first, it must be by will in writing: secondly, he must be seised of an estate in fee-simple; for tenant for another man's life, or tenant in tail, cannot give land by will by that statute: thirdly, he must be solely seised, and not jointly with another; and then being thus seised, for all the land he holdeth in socage tenure, he may give it by will; except he hold any piece of land *in capite* by knight-service of the King, and then, laying all together, he can give but two parts by will; and the third part of the whole, as well socage as *in capite*, must descend to his heir, to answer wardship, livery, and primer seisin to the crown.

And so if he hold lands by knight-service of a sub-

ject, he can of that land give but two parts by will; and the third the lord by wardship, and the heir by descent, is to hold.

And if a man that hath three acres holden *in capite* by knight-service do make a jointure to his wife of one, and convey another to any of his children, or to friends to take the profits to pay his debts, or legacies, or daughters' portions; then the third acre, or any part of it, he cannot give by will, but must suffer it to descend to the heir, and it must satisfy wardship.

Yet a man, having three acres, as before, may convey all to his wife or children by conveyance in his life time, as by feoffment, fine, recovery, bargain and sale, or covenant to stand seised to uses, and so disinherit the heir. But if his heir be within age when the father dieth, the King or other lord shall have that heir in ward, and shall have one of these three acres during the wardship, and to sue livery and primer seisin: but at full age the heir shall have no part of it, but it shall go according to the conveyance made by the father.

It hath been doubted how the thirds shall be set forth: for that it is the use that all lands which the father leaveth to descend to the heir, being fee-simple or in tail, must be part of the third; and if it be a full third, then the King, nor lord, nor heir, can intermeddle with any of the rest; if it be not a full third yet they must take so much as it is, and have a supply out of the rest. This supply is to be taken thus: if it be the King's ward, then by a commission out of the court of wards; whereupon a jury by oath must set out so much as will make up the third, except the officers of the court of wards and the parties can otherwise agree: if there be no wardship due to the King, then the other

lord is to have this supply by a commission out of the Chancery, and jury thereupon.

But in all those cases the statute doth give power to him that maketh the will to set forth and appoint of himself which lands shall go for thirds, and neither King nor lord can refuse it. And if it be not enough, yet they must take that in part, and only have a supply, in manner as before is mentioned, out of the rest.

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Property in goods and chattels is gained in ten ways: 1. by gift; 2. by sale; 3. by stealing; 4. by waiving; 5. by straying; 6. by shipwreck; 7. by forfeiture; 8. by executorship; 9. by administration; 10. by legacy.

1. By gift, property of goods may pass by words or writing. But if there be a general deed of gift made of all his goods, this is suspicious to be done upon some fraud, to deceive the creditors. And if a man that is in debt make a deed of gift to prevent the taking them in execution for his debt, this deed of gift is void as against those to whom he stood indebted; but as against himself, his own executors, or administrators, or any man to whom he shall afterwards sell or convey them, the deed is good.

2. By sale, any man may convey his own goods to another. And although he fear executions for debts, yet he may sell them outright for money at any time before the execution served, so there be no reservation of trust between the parties that, paying the money, he shall have the goods again; for that trust, in such case, doth plainly prove a fraud to prevent his creditors from taking the goods in execution.

3. If a man steal my goods or chattels, or take from me in jest, or borrow them of me, or as trespasser and not felon take them away, and carry them to a market or fair, and there sell them; this sale doth bar me of the property of my goods: saving that, if it be a horse, he must be ridden two hours in the open market or fair, between ten and five of the clock, and tolled for in the toll book, and the seller must bring one to avouch the sale known to the toll-book keeper, or else the sale bindeth me not. And for any other goods, where the sale in market or fair shall bar the true owner (being not the seller) of his property, it must be sale in a market or fair where usually things of that nature are sold. As for example; if a man steal a horse, and sell him in Smithfield, the true owner is barred by this sale; but if he sell the horse in Cheapside, or Newgate market, or Westminster market, the true owner is not barred, because these markets are usual for herbs,[1] flesh, fish, &c. and not for horses. So, whereas by the custom of London every shop there is a market all the days of the week, saving Sundays and holidays; yet if a piece of plate or jewel that is lost, or chain of gold or pearl that is stolen or borrowed, be sold in a draper's or scrivener's shop, or any other's but a goldsmith, this sale barreth not the true owner; *et sic in similibus.*

Yet by stealing of goods alone the thief getteth no such property but that the owner may seize them again wheresoever he findeth them, except they have been sold in fair or market after they were stolen, and that *bonâ fide* without fraud.

But if the thief be condemned of the felony, or outlawed for the same, or outlawed in any personal action,

[1] So in the two MSS.; omitted in the printed text.

or any way commit a forfeiture of goods to the crown, then the true owner is without remedy for those goods.

Nevertheless, if freshly after they were stolen the true owner make fresh pursuit after the thief and goods, and take the goods with the thief, he may take his goods again: and if he make no fresh pursuit, yet if he prosecute the felon so far as justice requireth, that is, if he get him indicted, arraigned, and found guilty, though he be not hanged nor have judgment of death, or have him outlawed upon the indictment, or to have judgment of death; in all these cases he shall have his goods again by a writ of restitution to the party in whose custody they be.

4. By waiving, the property of goods is thus gotten. A thief having stolen goods, and being pursued, flying away and leaving the goods, this leaving is called waiving; and the property is in the King, except the lord of the manor have right to them by custom or charter.

But if the felon be indicted and judged, or found guilty, or outlawed at the suit of the owner of these goods, he shall have restitution of the goods as before.

5. By straying, property in live cattle is thus gotten. When they come into other men's grounds, straying away from the owners, then the party or lord into whose grounds or manor they come causeth them to be seized, and a withe to be put about their necks, and to be cried in the[1] markets adjoining, showing the marks of the cattle; which done, if the true owner claim them not within a year and a day, then the property of them is in the lord of the manor whereunto they did stray

[1] So Harl. MS. The printed text has "three markets," and the Sloane MS. "three market days." *Two* proclamations in *two* several markets are required.

if he have estrays by custom or charter, else in the King.

6. By wreck, property is thus gotten. When a ship laden is cast away upon the coast, so that no living creature that was in it when it began to sink escapeth to the land with life, then all those goods are said to be wrecked; and they belong to the crown if they be found, except the lord of the soil adjoining can entitle himself by custom, (which we call *prescription*,[1]) or the King's charter.

7. By forfeiture, goods and chattels are thus gotten. If the owner be outlawed; if he be indicted of felony, or treason, and either confess it or else be found guilty of it, or refuse to be tried by peers or jury, or be attainted by judgment; or fly for felony, although he be not guilty; or suffer the exigent to go forth against him, although he be not outlawed; or if he go beyond seas without license; all the goods he hath at the judgment be forfeited to the crown; except some lord by charter can claim them. For in those cases prescription will not serve, except it be so ancient that it hath had allowance before the justices in eyre in their circuits, or in the King's Bench, in ancient time.

8. By executorship goods are gotten thus. When a man that is possessed of goods maketh his last will and testament in writing or by word, and maketh one or more executors thereof, these executors have by this will and the death of the party the property of all his goods, chattels, and leases for years, wardships of lands and body, extents of statutes, judgments, and recognisances, and all debts and specialities, as bills, bonds, and covenants of debt, and all conditions upon sale of

[1] So Sloane MS. The other authorities omit the clause.

leases for years, wardships, or extents, and all right concerning those things.

These executors may meddle with the goods and dispose them before they prove the will; but they cannot bring an action for any debt or duty belonging to their testator before they have proved the will.

The proving of the will is thus. They are to exhibit the will in the Bishop's court, and bring the witnesses thither, and there they are to be sworn; and the Bishop's officers do keep the original will, and certify the copy thereof in parchment under the Bishop's seal of office; which parchment, so sealed, is called the will proved.

9. By letters of administration property is thus gotten. When a man possessed of goods dieth without any will, there such things as executors should have had if he had made a will were by the ancient law to come to the bishop of the diocese, to dispose for the good of his soul that is dead, he first paying his funeral and debts, and giving the rest *in pios usus*. This is now altered by statute laws; so as the bishops are to grant letters of administration of the goods at this day to the wife if she require it, or to children, or next of kin; if they refuse it, as often they do because the debts are greater than the estate will bear, then some creditor or other will take it as the bishop's officers shall think meet.

It groweth often in question what bishop should have the right of proving wills, and granting administration of goods. In which controversy the rule is thus: that if the party dead had at his death known goods of some reasonable value, called *bona notabilia*, in divers dioceses, then the Archbishop of the province where he

died is to have the probate of his will, or to grant the administration of his goods, as the case falleth out; otherwise, the bishop of the diocese where he died is to do it.

If there be but one executor made, yet he may refuse the executorship, coming before the bishop, so he have not meddled before with any of the goods, or with receiving debts, or paying legacies.

And if there be more executors than one, so many as list may refuse; and if any one take it upon him, the rest that once did refuse may take it upon them when they will. And no executor shall be further charged with debts or legacies than the value of the goods come to his hands, so he foresee that he pay debts of record first, namely, debts to the King, then upon judgments, statutes, recognizances; and then debts by bond and bill sealed, or for rent unpaid, or servants' wages, or payment to head workmen; and, lastly, shop-books, and contracts by word. For if an executor or administrator pay debts to others before debts to the King, or pay debts by bond before those due by record, or pay debts by shop-books or contracts before those by bond, arrearages of rent, and servants' or workmen's wages, he shall pay the same again to those others in the said degrees.

But yet the law giveth them choice, that where divers have debts due in equal degree of record or specialty, he may pay which of them he will before any suit brought against him; but if suit be brought he must pay him that first getteth judgment against him.

Any one executor may convey the goods, or release debts, without his companion; and any one by himself may do as much as all together; but one man's releas-

ing of debts or selling goods shall not charge the other to pay so much of their goods, if there be not enough besides to pay debts; but it shall charge the party himself that did so release or convey. But it is not so of administrators, because they have but one authority by the Bishop given them over the goods, which authority, being given to many, is to be executed by all of them joining together.

And if an executor die making his executor, this second executor is to be executor to the first testator. But if an executor die intestate, then his administrator shall not be executor or administrator to the first; but in that case the bishop, whom we call the ordinary, is to commit the administration of the first testator's goods to his wife, or next of kin, as if he had died intestate; always provided, that that which the executor did in his lifetime is to be allowed for good. And so if an administrator die, and make an executor, this executor of the administrator shall not be executor to the first intestate; but the ordinary must new commit the administration of the goods of the first intestate again.

If the executor or administrator do pay debts or funerals or legacies of his own money, he may retain so much of the goods in kind of the testator or intestate, and shall have property of it in kind.

10. Property by legacy is where a man maketh a will and executors, and giveth legacies. He to whom the legacy is given must have the assent of the executors, or one of them, to have his legacy; and the property of that lease, or other goods bequeathed unto him, is said to be in him: but he may not enter nor take his legacy without the assent of the executors, or one of them; because the executor is charged to pay